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CIVIL AND CRIMINAL ENFORCEMENT OF THE COPYRIGHT LAWS

HEARING

BEFORE THE

SUBCOMMITTEE ON
PATENTS, COPYRIGHTS AND TRADEMARKS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-NINTH CONGRESS

FIRST SESSION

ON

THE AUTHORITY AND THE RESPONSIBILITY OF THE FEDERAL GOVERNMENT TO PROTECT INTELLECTUAL PROPERTY

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CIVIL AND CRIMINAL ENFORCEMENT OF THE COPYRIGHT LAWS

WEDNESDAY, APRIL 17, 1985

U.S. SENATE,
SUBCOMMITTEE ON PATENTS,
COPYRIGHTS AND TRADEMARKS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, at 9:45 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Charles McC. Mathias, Jr. (chairman of the subcommittee), presiding.

Present: Senators Metzenbaum and Leahy.

Staff present: Steven J. Metalitz, staff director; Ralph Oman, chief counsel; John D. Podesta, minority chief counsel; Pamela S. Batstone, chief clerk; Randolph M. Collins, legislative aide; Sharon M. Donovan, secretary; C. Mark McGhee, staff assistant (Subcommittee on Patents, Copyrights and Trademarks); Randall Rader, counsel (Subcommittee on the Constitution); Eddie Correia, minority chief counsel; Rochelle Pickard, legal intern (Subcommittee on Administrative Practice and Procedure); and Beverly E. McKittrick, counsel (Subcommittee on Criminal Law).

OPENING STATEMENT OF HON. CHARLES McC. MATHIAS, JR., A U.S. SENATOR FROM THE STATE OF MARYLAND

Senator MATHIAS. The committee will come to order.

In the 98th Congress we created the Subcommittee on Patents, Copyrights and Trademarks in recognition of the importance of the protection of intellectual property and its relation to the prosperity and security of the United States. Now, since its resurrection, the subcommittee has helped to focus attention on the relationship between the copyright laws and the whole array of new electronic marvels that flood the marketplace, products like video cassette recorders, microcomputers, compact discs, laser discs, and high-resolution television.

We passed the Audio First Sale Act, the Semiconductor Chip Protection Act, and amendments to the Generalized System of Preferences to encourage respect for copyright in other countries. We ratified the Brussels Satellites Convention.

Now, with all of that legislative activity on top of the major copyright reform of 1976, there is a great deal to digest. So we have scheduled this hearing today to give us a chance to reflect on the progress that we have made and to assess how well or how badly the copyright laws are furthering the constitutional mandate of ar-

ticle I, section 8, which is to "promote the progress of science and useful arts."

The questions are these: Is copyright protection adequate? Are the rewards too generous? Are the remedies realistic? Have the rights of authors taken a back seat to the rights of people who use or consume their creations? Are the courts equipped to handle copyright cases? Have limited resources led Federal criminal enforcement officers to give short shrift to serious claims of victims of copyright piracy? Does piracy in the international market show any sign of abating?

Now, these are questions that I will be asking, and I trust that our witnesses today are prepared to give us their candid answers.

I might announce at this time that we will keep the record open for 3 weeks so that all of the witnesses will have time to extend their remarks and to respond to written questions and to reflect on the statements of other witnesses. We have asked all witnesses to limit oral presentation to 5 minutes. However, I will rule at this point that all written statements will be included in full as a part of the record.

We are very pleased to have as our first witness a friend of this committee, the Deputy Assistant Attorney General for the Criminal Division, Victoria Toensing, and I am happy to welcome her here this morning.

STATEMENT OF VICTORIA TOENSING, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE

Ms. TOENSING. Thank you, Mr. Chairman.

I am very happy to be here and I appreciate the subcommittee giving me the opportunity to share with it the Department of Justice's role in enforcing the criminal provisions of the 1976 Copyright Act and its 1982 amendments.

I have submitted a longer statement for the record, Mr. Chairman, and I assure, to your relief, that my remarks will be limited to the 5 minutes that the subcommittee has requested.

The authority and the responsibility of the Federal Government to protect intellectual property is found in the United States Constitution, article I, section 8, clause 8, which grants Congress the power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

The first act was passed in 1790. By 1976, new forms of artistic expression not even contemplated almost 200 years before, were in need of protection. Congress met that need and in 1976 Congress extended the copyright coverage to sound recordings, motion pictures, audio and video tapes, video games, computer programs, and software.

The role of the criminal law has changed significantly. Prior to 1982, Congress had provided misdemeanor penalties. The new penalty amendment in 1982 makes certain quantities of copyright violations a felony punishable by a maximum of 5 years and $250,000 fine.

I know that the subcommittee has expressed an interest in the Justice Department's May 1984 revision to the U.S. attorney's manual. There was no intent in this revision, Mr. Chairman, to reflect any retreat from what we consider effective enforcement of the copyright laws. The discussion of civil remedies in that 1984 submission should not be interpreted as any policy message to the U.S. attorneys that criminal enforcement should be on the back burner. Because of this misunderstanding, we have revised that 1984 submission to reflect our position, which is basically that all meritorious cases which come within the parameters of the statute should receive serious consideration.

You should also know, Mr. Chairman, that there has been a history of interest in copyright prosecutions in the Criminal Division. Julian Greenspun, who I believe worked with your subcommittee on the trademark law, has a keen interest in this area, and he is a member of the General Litigation Section which was the primary responsibility for the copyright laws. Mr. Greenspun talked with representatives of the major industries several years ago—1981, 1982—to tell them of the Department interest in pursuing these cases. He spoke with the record industry, the motion picture industry, and the computer industry. Not only did he tell of our support, but he also communicated to each industry an offer that if for some reason they found a certain U.S. attorney's office was unable or did not wish to bring a certain prosecution that we had an offer in the Criminal Division, in the General Litigation Section, to review that case to see if it merited prosecution. This was not a promise, of course, to prosecute, but only to review the case to see if for some reason someone had not considered all the right angles or all the reasons for prosecution.

I must say that I think recent communications have improved between the industries and the Justice Department. In 1981, when Mr. Greenspun called the motion picture industry, he was told by the security office there that there were no problems. I know of one U.S. attorney who, independent of Mr. Greenspun, also called the motion picture industry security people, and he was also told that there were no problems. However, when we met with Jack Valenti recently we made our offer to take any cases that he was concerned about. We have now received some cases in our office and we are reviewing them.

Another success by the record industry as a result of this offer has been a conviction in South Carolina last fall of a George Washington Cooper. He was convicted of distributing counterfeit tapes and received a 12-year sentence, $25,000 fine. I must say that that is the highest sentence and fine that we have to date in this type of a conviction. So I have hopes for the future, Mr. Chairman. I think we now have established good communication and that we will be working together to prosecute these violations.

Senator MATHIAS. One issue of interest to the subcommittee is whether the prosecutive policy in the Department has been updated to reflect the concerns that led the Congress in 1982 to enact these increased penalties for audio and video piracy, and from what you have just said, I would assume that the Department has taken due notice of congressional action.

Ms. TOENSING. Yes, we have, Mr. Chairman. We are interested in these cases. We are truly interested.

Senator MATHIAS. They deserve interest because they represent substantial economic interests of the United States, and in a period in which we have a $130 billion trade deficit, we ought to claw and fight for every advantage we can get in this field.

In 1980, the Attorney General established a set of priorities for investigation and prosecution of white-collar crime. Copyright violations were not at that time one of the priority cases unless three criteria were satisfied. To qualify as a priority case, piracy had to involve a manufacturer/distributor who distributed pirate goods in three or more States or countries and caused a half a million dollars or more in aggregate losses. Those were fairly steep priorities.

Now, of course, those guidelines date from a time when most piracy offenses were misdemeanors, when the Justice Department opposed any increase in penalties for copyright violations.

Are these guidelines still in effect with regard to copyright prosecutions?

Ms. TOENSING. No, Mr. Chairman, they are no longer in effect.

Senator MATHIAS. What is the current guideline as far as copyright piracy is concerned?

Ms. TOENSING. Let me explain how we are approaching white-collar crime today in the Department of Justice.

What happened when Attorney General Smith took office was a renewed look at white-collar crime, and he established the Economic Crime Council, which I am sure the chairman is aware of. This is composed of 20 U.S. attorneys throughout the country and other representatives from the Department of Justice. It is a policy establishing committee to review white-collar crime and set priorities.

Let me also say that priority does not necessarily mean those crimes we are most interested in or those we think are the most important. They also include crimes in the white-collar area where because of the nature of the crime there is a need to have a focus or control from the Department of Justice. I probably should not say control when I am talking about what U.S. attorneys carry out, Mr. Chairman, but let me say coordination from the Department of Justice to help people where there could be problems back in Washington. I use as an example the Medicare/Medicaid Fraud Program where many times, in order to unravel who reports to whom and what the policies are, we have to take hold of a case here back in Washington to help the U.S. attorneys. So that is what the Economic Crime Council is doing, setting up as its goals to take on certain crimes that need this kind of focus, coordination from Washington, crimes that had not been prosecuted up until now. So that kind of policy has replaced Attorney General Civiletti's guidelines of 1980.

Senator MATHIAS. I think those guidelines were providing inadequate protection in the copyright field, but if they have been abrogated and there is nothing very firm replacing them as you describe it, how is a local U.S. attorney or local FBI office going to approach this kind of case?

Ms. TOENSING. The present policy is if a case merits prosecution, that it should be seriously considered and there is a backup procedure for the industries, that if certain cases are rejected from the

U.S. attorney's office, then they should bring them to the General Litigation Section for review.

Senator MATHIAS. For lack of a better word, would it be local option?

Ms. TOENSING. Well, Mr. Chairman, that is sort of the way U.S. attorney's offices operate. We do try to give them a lot of independence. However, when we see a problem, we try to help out with it in main Justice. That is the role of the different litigation sections.

I might add that I had my staff get some statistics from the record industry for 1984, and that industry in the last year referred 26 cases to the U.S. attorney's offices and 21 of these were prosecuted. So the local option probably is doing pretty well, at least for the record industry.

Senator MATHIAS. If there were a case, for example, of video piracy that might involve millions of dollars of export profits and did not meet some of the other criteria, would it still be prosecuted under the current practice?

Ms. TOENSING. When you say "other criteria," I hope you are not referring to the old guidelines, because they are no longer in effect.

Senator MATHIAS. That is exactly what I mean. That would not be effective?

Ms. TOENSING. No. The important thing would be fulfilling the elements of the offense, Mr. Chairman. It is much easier to bring a case against the manufacturer in a copyright violation because you have your evidence of the reproducing of the goods. When you get further down the chain, when you get down to your distributors, your intent element becomes more troublesome because these types of persons say, for example, that they got it in a bankruptcy sale, and how was he or she to know it was a reproduction. So that is where we are really concentrating, in the fulfilling of the elements.

Senator MATHIAS. When you talk about getting down the chain, that, of course, applies on both sides, the Department side as well as the industry side.

In every ship in the Navy, there is always some sailor who does not get the word, and we hear from time to time of U.S. attorneys or special agents in charge who still seem to want to apply the old guidelines, or at least think in those terms, whether or not they actually know that the guidelines have been abandoned. In some districts, the copyright proprietors have encountered blanket policies simply declining prosecution on the basis of the old guidelines, for example, on the basis that a pirated video cassette has not been proven to be distributed in at least three States. We get reports, and I cannot vouch for the veracity of them, but they come to us, that some of the FBI field offices take the same general attitude.

Now, based on what you have told us, the field offices are in error, they are not up to date, and there is no longer a blanket policy to decline prosecution. What can be done at the Department level to publish the current state of the Department's practice?

Ms. TOENSING. Well, the first step is distributing the new submission to the U.S. attorney's manual. It was approved 2 days ago. When Mr. Trott, the Assistant Attorney General from Criminal, returns from a trip, we have a letter addressed for his signature to send this revision out to all the U.S. attorneys so that they do get the word. This is not the usual procedure that we use in revising

the U.S. attorney's manual. It is usually distributed on a lower level to the offices, but we are going to send it out in that manner so that people do get the word

Senator MATHIAS. That is good news because I think that should underscore not only the change itself, but it should also underscore the fact that the Department considers the protection of intellectual property a serious and important responsibility. So I think that is splendid.

Do you have a copy of the revision with you or could you supply a copy for the record?

Ms. TOENSING. I think that has been done, Mr. Chairman.

Senator MATHIAS. Yes, counsel advises me that we already have a copy; so we will make that, at this point, a part of the record.

[A copy of the revision to the U.S. attorney's manual follows:]

U.S. Department of Justice

Executive Office for United States Attorneys

Washington, D.C. 20530

TO: Holders of United States Attorneys' Manual Title 9

FROM: United States Attorneys' Manual Staff
Executive Office for United States Attorneys

Stephen S. Trott
Assistant Attorney General
Criminal Division

RE: Prosecutive Policy

NOTE: 1. This is issued pursuant to USAM 1-1.550.
2. Distribute to Holders of Title 9.
3. Insert at end of USAM Title 9.
4. Remove bluesheet dated May 24, 1984, affecting USAM 9-71.400.

AFFECTS: USAM 9-71.400

The following is a new section:

9-71.400 PROSECUTIVE POLICY

In determining whether to proceed with a criminal copyright prosecution, the United States Attorney should bear in mind two important considerations. First, federal law now preempts much of the copyright field. 17 U.S.C. § 301. This federal preemption largely eliminates the state courts as a forum for copyright prosecutions. Thus, a decision by the United States Attorney to decline prosecution in a copyright matter generally forecloses all avenues of criminal prosecution. This consideration suggests that all criminal copyright matters should receive careful attention by the United States Attorney.

Second, the criminal penalties of 17 U.S.C. § 506(a) for willful infringements undertaken for purposes of commercial advantage or private financial gain, form an important part of the copyright enforcement scheme. An increased need for deterrence in this area is reflected in the 1982 enactment of felony penalties for piracy and counterfeiting of sound recordings and audiovisual works. See 18 U.S.C. § 2319. Consequently, all meritorious cases, not just those within the pre-1982 guidelines on this subject, which fall within the parameters of these felony statutes should receive serious consideration.

Once the elements of the offense are technically met, the United States Attorney should consider the following factors in determining whether to pursue a criminal copyright prosecution.

(1) The seriousness of the offense. Felony penalties for first offenses begin at seven copies for audiovisual works, and one hundred copies for sound recordings. In this context, prosecution of felony offenses of comparatively moderate scale may have substantial deterrent impact. It should also be kept in mind that lesser volumes of counterfeiting or pirating activity may suitably lend themselves to the plea bargaining process in particular cases since 18 U.S.C. § 2319(b)(3) provides misdemeanor penalties upon conviction for the first offense. A misdemeanor plea also serves a deterrent function because of the prospect of felony charges for a future offense. Prosecutions focused on the most serious offenders should, of course, be given top priority. Thus, appropriate factors should include the nature and volume of the infringing activity or a prior history of similar conduct by the suspect. Individuals who have continued to infringe for financial gain after civil remedies have been successfully invoked should receive particular attention.

(2) The likelihood of successful prosecution. An unsuccessful prosecution could be counterproductive not only in terms of allocation of resources, but also with respect to deterrence. The presence of legal or evidentiary problems should be carefully evaluated particularly with regard to criminal intent. A suspect who is making the counterfeit or pirated works himself or herself may be a promising suspect since the possession and use of elaborate duplicating equipment, blank cassettes or labels, in order to manufacture illegal copies for sale, may be good evidence of criminal intent. As to others in the chain of distribution, a greater degree of proof of criminal intent is usually necessary to preclude the successful assertion of defenses, such as lack of scienter.

If assistance or legal advice is needed, or if resource limitations do not permit the handling of a particular case which otherwise merits prosecutive attention, please contact the General Litigation and Legal Advice Section of the Criminal Division, FTS 724-6948.

Senator MATHIAS. Pursuing that point just for a moment, one of the controversial elements of the 1984 manual change was that, and I am quoting, "the existing Federal statutory scheme clearly contemplates enforcement primarily by civil means." So it described the criminal remedies as simply supplementary to the civil means. It stated that declining prosecution in favor of private civil action would frequently be the proper course for a U.S. attorney to take.

Now, in the revisions that you have submitted, there seems to be a different tone. I wonder if you would just summarize briefly the Department's position on the relationship of civil remedies to the criminal enforcement of the Copyright Act.

Ms. TOENSING. There are times, Mr. Chairman, that a civil remedy is the better approach to take. I think we must all agree on that. There are times when an injunction is a much better action to take, for instance, when you get down the chain and you have problems with the intent element. And so what the policy is for the department is that the U.S. attorney should look at what the facts are in each case, and he or she should look at which route is the better one to take to enforce the law. If the criminal elements are fulfilled, we should go that route. But if somebody's interest could be better fulfilled—for instance, we have a case now where there are some accusations that there are some pirated tapes being sold

at fairs, at these antique fairs, there is some kind of a name, attic kinds of sales—

Senator MATHIAS. Flea markets.

Ms. TOENSING. That is the word I wanted.

Well, that is very difficult to find all the people and track them down. And so finding an injunctive kind of remedy is perhaps the better course. But certainly where there is a prosecutable case, we should go criminally and I think the prior U.S. attorney's manual submission was inartfully drafted. Both of these remedies should be pursued, and Congress made that very specific in the law when they passed section 501, saying that there is a cause of action for the owner of the infringement. So I assume Congress also wanted to give an action for the owner of the copyright.

Senator MATHIAS. As welcome as the manual changes are, they are also very fresh. The ink is still fresh on them from our point of view because I believe we just got them late yesterday afternoon. Rather than pursuing that, I will probably submit some questions on the manual changes to you to be added to the record after we have had time to reflect on them a little bit.

You mentioned some of the problems of prosecution. Are there any figures? Has this effort been underway long enough to accumulate any kind of record of the success rate? Can you tell us what percentage of audio or video piracy cases result in convictions?

Ms. TOENSING. We have not been keeping records in that kind of form, Mr. Chairman. The record industry keeps excellent records. And as I said, we have statistics from them, that they made the 26 referrals and we had 21 prosecutions. But the way the U.S. attorney's office keeps their records—let me also add we are in the process of changing our computer—so for the past year they are not the best records in the world, but we have done it just by violation. So you might see a 506 or a 2319 violation, but you would see only the statute that it comes under and you would not know how to separate them under records or movies.

Senator MATHIAS. How do the courts react to the copyright cases? Are judges concerned? Do they take them lightly?

Ms. TOENSING. I do not think we have enough of the new felony prosecutions to make a judgment on the courts.

I am encouraged by the South Carolina conviction and sentence of 12 years and a $25,000 fine.

Senator MATHIAS. Well, that would be a sign that at least one court——

Ms. TOENSING. One Federal judge.

Senator MATHIAS [continuing]. Understands the seriousness of this.

But I think the committee would be interested in the department's continuing observations on the attitudes of courts, because it can make a difference.

Ms. TOENSING. We just had several guilty pleas, Mr. Chairman, under the new trademark law for the selling of some Rolex watches in Chicago, and I do not think those defendants have been sentenced yet. But I will get those figures for you so you can get some feeling of what they think about it in the Midwest.

Senator MATHIAS. If there is anything you can supply for the record in that area, we would be glad to have it.

You mentioned several times communication with the industry and cooperation with the industry, and I think that is important. Has this made it easier to prosecute cases? Has it made it easier to economize on the resources of the department?

Ms. TOENSING. Yes. Their cooperation is much needed and much appreciated. The *George Washington Cooper* case in South Carolina was brought to us as a result of their coming to the criminal division, because we had made that offer to look at any cases they were concerned about so that they help us when they bring us the cases.

Senator MATHIAS. In some Federal districts, it is reported that the U.S. attorneys have developed a kind of a mad-dog rule: every dog is entitled to one bite. They have adopted the policy of simply warning first offenders rather than prosecuting them, even when investigation revealed that the individual that was suspected may have duplicated a sufficient number of videotapes to qualify for felony punishment under the 1982 amendments. I suppose the typical case would be that of a video dealer who copies a popular video cassette in the back room and then moves the copies out onto the counter either for sale or for rent.

Are you aware of this warning policy, this mad dog policy?

Ms. TOENSING. I had heard some questioning in that area, Mr. Chairman, so we looked into it. I think there is confusion with what perhaps is the FBI policy. It is not the U.S. attorney's policy to warn, but FBI policy, and then let me explain what that is and the reason for it.

As I have said previously, sometimes when you get down the chain and you do not really have the manufacturer but you have people who are distributing the tapes, you have this defense of, "Well, I did not know, how was I to know these were improper goods, or that these were counterfeit goods?" So when the FBI finds someone that they are perhaps suspicious of but do not have the evidence on, they will go in and say, "You know, you may be buying some kind of counterfeit tapes, and we want you to take notice and we want you to check when you are purchasing these tapes because we have reason to believe that you may be getting counterfeit goods." And so the FBI provides the person some kind of notice that could be brought into court later if subsequent to that warning the person continues to buy these kinds of goods and declares he just had no idea that they were copyright infringement or counterfeit.

Senator MATHIAS. Let me turn to the Senator from Ohio and see if he has any questions.

OPENING STATEMENT OF HON. HOWARD M. METZENBAUM, A U.S. SENATOR FROM THE STATE OF OHIO

Senator METZENBAUM. Not at this moment, Mr. Chairman. I was at another hearing and came in late, and I am going to have to leave again shortly, but I am interested in the subject and have read the statement of Ms. Toensing, and I share your concern about some of the issues that are being raised here this morning.

Senator MATHIAS. One other point I would like to explore just briefly is the question of software piracy, because that again touch-

es on a very significant economic interest to the United States, one that is of great importance to the country. It is a growing problem and it probably will continue to grow as microcomputer usage becomes more and more common in offices and homes throughout the country.

I am wondering if the Justice Department is encountering any cases in which software piracy is undertaken for commercial advantage or private financial gain and, therefore, falls within the criminal provisions of the Copyright Act?

Ms. TOENSING. I believe we have some cases under investigation at this time. However, it is our interpretation that the enhanced penalties do not apply to the software industry unless they are Pac Man or could be considered audiovisual kinds of programs. The enhanced penalties are pretty clear as to what they apply to, and they do not apply to computer kinds of programs that are written.

Senator MATHIAS. Well, that is really what I was getting at. The question is, what does the Department consider the authorized punishment for software piracy? We are told that some computer programs are associated with audiovisual works, video games, for example, and copyright violations of these programs could result in felony liability under the 1982 amendments which, as you know, include a graduated penalty scheme for copying audiovisual works. But the interesting thing is that other computer programs, programs with a scientific or a business value, rather than an entertainment value, may not be considered as important. Copying of these programs would simply be a misdemeanor.

Is that the dichotomy as you see it?

Ms. TOENSING. Yes; that is our characterization of the law. That is our interpretation of the law as it was amended in 1982.

Senator METZENBAUM. Do you think the law should be changed?

Ms. TOENSING. If it is Congress' intent to cover those computer programs, certainly it will need to be changed.

Senator METZENBAUM. Have there been sufficient facts disclosed to you that make you believe that there would be merit and there would be a need for changing the law to broaden the penalties with respect to software piracy?

Ms. TOENSING. It is always better to go in with a felony charge rather than a misdemeanor charge. I think it sends a message to the courts of the importance of the violation.

Senator METZENBAUM. How many software piracy matters would you say have come to your attention, that is, the attention of the Department, in recent years?

Ms. TOENSING. I would not have those figures with me. We could get them for you. It would not only include the Criminal Division, but also all U.S. attorney's offices, and I do not have all of those figures.

Senator METZENBAUM. Would they be substantial?

Ms. TOENSING. I do not think I would be able to say there has been 250 or some kind of a number that would sound substantial, Senator, but any kind of infringement is important because of the nature of the crime. As the chairman says, this affects our economy, this affects our balance of trade.

Senator METZENBAUM. It seems to me that the value could very well be substantially greater than the Pac Man kind of piracy.

Piracy of audiovisual products very well may justify our changing the law. And I cannot see that that would be too difficult, to get that kind of law changed through the Congress. I would guess there would be support for it.

Senator MATHIAS. Senator Metzenbaum, before you came into the room, we had been discussing the procedures under which prosecutions have not been brought in the past and are being brought at the present time, and the fact that the Department has now offered to take a second look at cases, that is some of the ones that were rejected in the field.

Would that second look be available in the computer software cases as well as in the entertainment field?

Ms. TOENSING. Oh, certainly. Just for the record, Mr. Chairman, that offer is not recent. That offer has been out there for several years. I did not want you to think that was made as a result of this hearing. It is a genuine interest.

Senator MATHIAS. That is the important thing. We will not examine the motives for it as long as it is happening.

We will have some further questions for the Department as we study the revised manual for the U.S. attorneys. But, in the meantime, we are very grateful for you being here today.

Senator Metzenbaum.

Senator METZENBAUM. No further questions.

Ms. TOENSING. Thank you.

[The following statement, together with subsequent responses to additional questions of Senator Mathias, was received for the record:]

PREPARED STATEMENT OF VICTORIA TOENSING

Mr. Chairman and members of the Subcommittee, my name is Victoria Toensing. I am a Deputy Assistant Attorney General in the Criminal Division of the Department of Justice. I am pleased to be here today to discuss with you the Department's role in the enforcement of the criminal provisions of the Copyright Act of 1976 and subsequent 1982 amendments to the penalties provision.

At the outset let me assure you that the Department of Justice considers criminal copyright infringement to be a significant matter. We are sensitive to the problems created by the traffic in counterfeit copies of copyrighted works and, restricted only by our limited resources, are taking all appropriate action to curb this illegal trade.

The problem of copyright infringement can perhaps best be understood in its historical context. The responsibility of the Federal Government to protect intellectual property is as old as the Constitution itself. Article I, Section 8, Clause 8 of the United States Constitution conferred on Congress the power, "[t]o Promote the Progress of Science and Useful Arts, by securing for Limited Times to Authors and Inventors the Exclusive Right to Their Respective Writings and Discoveries."

Beginning with the Act of May 31, 1790, c. 15, I Stat. 124, Congress has exercised this power to provide federal copyright protection to an increasingly wide range of intellectual properties. Thus, under the Copyright Act of 1976 many new forms of artistic expression are entitled to copyright protection. For example, the copyright laws now extend to sound recordings, motion pictures, audio and video tapes, video games, computer software and programs.

The integrity of these copyrights has been promoted both by private civil remedies and by criminal sanctions. The role

of the criminal law in this area, however, has changed significantly in the past three years. Prior to 1982 Congress generally defined criminal copyright infringement as a misdemeanor offense.

In 1982, however, Congress enacted a significant amendment to the criminal copyright laws. This amendment, supported by the Department of Justice, increased dramatically the penalties for criminal infringement of certain copyrights. Under the new law, willful copyright infringements involving certain quantities of sound recordings or audio visual works are felonies, punishable by as much as five years imprisonment and a $250,000 fine. See 18 U.S.C. §2319(b).

The commitment of the Department in this area was recently underscored by former Attorney General William French Smith in a letter to Jack Valenti, President of the Motion Picture Association of America. A similar letter was sent by Assistant Attorney General Stephen S. Trott to you, Mr. Chairman, on February 26, 1985.

Our commitment in this field is also illustrated by the active role which the Department has taken in the investigation and prosecution of these cases. In August of 1984 George Washington Cooper, III, a major distributor of counterfeit audio tapes, was convicted in federal district court in South Carolina on twelve counts of an indictment charging him with conspiracy and criminal copyright infringement. Cooper was sentenced to twelve years imprisonment and a $25,000 fine for his role in this scheme. We believe that this sentence equals the most severe penalty ever imposed in a criminal copyright case. Moreover, two of Cooper's distributors have been convicted separately in federal district court in North Carolina for their participation in this illegal operation. The Department's commitment to vigorous enforcement of the copyright law is reflected by the Criminal Division's active involvement in all of these

prosecutions; a Criminal Division attorney was specially assigned to try Mr. Cooper.

We, of course, intend to continue with these efforts. The Criminal Division is currently coordinating a number of investigations in this area. As part of this effort we are working with representatives of the affected industries, the FBI and various United States Attorneys' offices. Since these investigations are on-going, we are unable to comment publicly on the details of them. However, we expect that our efforts will lead to additional prosecutions under the Copyright Act in the near future.

Consistent with our commitment, it is the policy of the Department that all meritorious copyright cases should receive the careful attention of the United States Attorney. United States Attorneys' Manual, §9-71.400. (May 24, 1984) Recently, representatives of the motion picture and recording industries expressed concern that the revised United States Attorneys' Manual might be construed to permit declination of worthy criminal cases in favor of civil remedies.

I would like to take a few moments today to clarify this misunderstanding. The 1984 revision to the United States Attorneys' Manual did not constitute a retreat from our commitment to effective enforcement of the copyright laws. Nor should the prosecutive policy described in the Manual be construed as a departure from our prior practice in this area. It is important to recognize that the policy statement in the Manual is not a standard for the declination of cases. Rather it simply provided prosecutors with some general guidance concerning factors they should consider when exercising prosecutorial discretion in this area.

Many of the factors mentioned in the Manual, in fact, caution against the declination of cases. For example, the Manual warns prosecutors that the federal government has preempted the copyright field. This action has largely

eliminated the states as a forum for prosecution of these cases. Because of this federal preemption, the Manual instructs prosecutors to give all criminal copyright matters their careful attention.

Nonetheless, to ensure that federal prosecutors in the field do not misconstrue the Manual, we have revised it to clarify our original intent that all meritorious cases be aggressively pursued. We have also a draft letter to all United States Attorneys which will specifically bring this revision to their attention and ensure there are no uncertainties regarding the Department's policy in this area.

In concluding on this issue, let me say, once again, that the Department of Justice is committed to the effective enforcement of the copyright laws. This commitment is reflected in the cases which we have prosecuted and in those which we are now investigating. It is also demonstrated by the Department's policy in this area, a policy which urges all United States Attorneys to give copyright matters their careful attention. We all know that the Department does not have sufficient resources to investigate and prosecute every act of copyright infringement. Unfortunately, it is no different in other areas of criminal violations. However, we believe that the current policy adequately ensures the integrity of the copyright system. I can assure you that our efforts in the copyright field will continue unabated.

Mr. Chairman, this concludes my prepared statement. I should be pleased to respond to any questions you or the Subcommittee may have.

U.S. Department of Justice

Criminal Division

Deputy Assistant Attorney General

Washington, D.C. 20530

MAY 23 1985

Honorable Charles McC. Mathias, Jr.
United States Senate
Washington, D. C. 20510

Dear Senator Mathias:

On April 23, 1985 you wrote concerning my April 17, 1985 testimony before the Senate Judiciary Committee, Subcommittee on Patents, Copyrights and Trademarks. In this letter you submitted a series of follow-up questions relating to criminal enforcement of the copyright laws. Enclosed please find responses to these questions.

During my appearance before the Subcommittee you also asked about sentences in criminal prosecutions under the new criminal trademark counterfeiting statute, 18 U.S.C. §2320. The Department is aware of two recent convictions under Section 2320 in the Northern District of Illinois. At the hearing I promised to provide you with information concerning the sentences in those cases. The Northern District of Illinois United States Attorney's office informs me that these two defendants agreed to enter pre-indictment guilty pleas to one count of a criminal information charging them with violating Section 2320. In return the United States agreed to make no recommendation as to sentence. Although each could have been sentenced to a five year maximum, the court sentenced one defendant to one year probation and a $10,000 fine, and the other received a sentence of one year probation and a $5,000 fine.

Finally, I promised you a copy of the cover letter Assistant Attorney General Trott sent to all United States Attorneys when he mailed the changes on copyright prosecutions in the United States Attorney Manual. It is also enclosed. I hope this information is helpful. Please let me know if you have any further questions.

Sincerely,

Vicki

Victoria Toensing
Deputy Assistant
Attorney General

Enclosure

Responses of Deputy Assistant Attorney General Toensing to Additional Questions of Senator Charles McC. Mathias, Jr.

1. In light of your testimony that the 1980 guidelines on white collar crime have been abrogated insofar as they define priority status for prosecutions for violations of the Copyright Act, please describe what standards should guide the decisions of U.S. Attorneys in this area. Does the 1985 revision of the U.S. Attorneys' Manual (USAM) constitute the sole general guidance from the Justice Department in these cases?

ANSWER: The 1985 revision to the United States Attorneys' Manual constitutes the only general guidance to federal prosecutors concerning criminal copyright proscutions. The revised United States Attorneys' Manual now emphasizes that federal preemption in the copyright field has largely eliminated state courts as a forum for these prosecutions. The Manual advises federal prosecutors that this preemption makes the role of federal law enforcement in this area all the more important. The Manual also specifically focuses on the enhanced penalty provisions of 18 U.S.C. §2319 and encourages prosecutors to give "serious consideration" to all meritorious cases which fall within these penalty provisions.

2. Does the Department plan to revise the 1985 revision of the U.S. Attorneys' Manual to reflect the position, presented in your testimony, that the "pre-1982 guidelines" referred to in the revised USAM provision are no longer in effect?

ANSWER: The Department of Justice advised all United States Attorneys that the Attorney General's White Collar Crime Guidelines are no longer in effect in a May 7, 1985 letter from Assistant Attorney General Stephen S. Trott, a copy of which is enclosed. The letter, which informed prosecutors of the 1985 copyright revisions in the United States Attorneys' Manual, specifically stated that the "Department of Justice white collar crime guidelines, promulgated in 1980. . .are no longer in use." In light of this information we do not plan to further revise the Manual at this time.

In any event, it is important to understand that the White Collar Crime Guidelines were never intended to serve as standards for the declination of cases. Rather, they simply identified areas which the Department believed merited priority consideration. This function is now performed by the Department of Justice Economic Crime Council.

3. What actions does the Department plan to take to communicate to field offices of the Federal Bureau of Investigation the changes in prosecutive policy in this area (including both the 1985 revision to the USAM and the abrogation of the 1980 white collar crime priority guidelines in the copyright area)? Will the FBI field manuals that define the distinction between priority and non-priority cases be changed to reflect the changes in prosecutive policy?

ANSWER: By separate cover, when these responses are sent to you, they will be sent to the FBI along with the recent revision to the United States Attorneys' Manual and Deputy Assistant Attorney General Victoria Toensing's April 17, 1985 testimony before this Subcommittee. We will also request the FBI to advise the Subcommittee of any planned revisions in its field manuals relating to copyright investigations.

4. You indicated that statistics on convictions and sentences were classified by reference to the statute upon which the conviction was based. What information can you provide concerning sentences imposed for convictions under 17 U.S.C. Section 605 [sic], or 18 U.S.C. Section 2319, since the latter was enacted in 1982? Do you have any figures for the percentage of prosecutions under these statutes that result in conviction, or the percentage of such prosecutions that are resolved by pleas of guilty.

ANSWER: The Executive Office for United States Attorneys maintains some limited statistics concerning criminal copyright prosecutions. These statistics are compiled on a fiscal year basis and reflect the number of cases filed and terminated in a given year, as reported to the Department by the United States Attorneys. They may not reflect accurately all prosecutions in this area because at times when additional statutes are charged a conviction may be reflected only under the other statute. The statistics identify the number of individual defendants charged with copyright violations and provide information concerning the disposition of defendants in terminated cases. The statistics, however, simply list copyright prosecutions. Accordingly, they do not separately designate violations of 17 U.S.C. §506 or 18 U.S.C. §2319. Moreover, while these statistics show the total number of defendants convicted in a given year, they do not distinguish between convictions obtained at trial and those obtained through guilty pleas. A statistical summary of copyright prosecutions derived from the United States Attorneys' Office Statistical Reports for fiscal years 1976 through 1984 is set forth below:

SUMMARY CHART OF COPYRIGHT PROSECUTIONS
1976 TO 1984

	Cases		Defendants		Disposition of Defendants in Terminated cases				
	Filed	Terminated	Filed	Terminated	Guilty	Not Guilty	Dismissed	Rule 20	Other
1976	62	84	95	119	79	1	26	11	2
1977	93	80	128	108	84	4	18	1	1
1978	56	80	71	103	75	4	22	0	2
1979	53	50	68	57	35	0	11	10	1
1980	82	82	101	104	88	0	7	4	5
1981	75	65	105	88	75	0	10	0	3
1982	58	72	76	91	78	3	6	4	0
1983	44	43	57	64	46	0	7	5	6
1984	34	35	38	40	33	1	5	0	1

5. In your testimony, you discussed the Justice Department's offer to take a "second look" at any criminal copyright case in which a local U.S. attorney has declined prosecution. In these situations, what sort of investigative report is made available to Main Justice, beyond the information presented by the private party seeking prosecution? Is the reason for declination, as well as other material relevant to the case, communicated by the local federal prosecutor or FBI office to Main Justice? What steps does the Department take to make sure that, in these "second look" cases, it has before it all the relevant facts?

ANSWER: Whenever the Department is asked to review a declination decision in a copyright case, it makes every effort to ensure that it has received all the information necessary for an informed prosecutive decision. While the steps taken to obtain this information vary from case to case, typically the

Department receives and examines information provided by the private parties alleging infringement. We will also review any information developed by investigators for the affected industry trade association. Finally we solicit the views of the local United States Attorney along with those of any law enforcement agency which has investigated the matter, together with any evidentiary materials necessary for an informed prosecutorial decision.

6. What is the state of technical expertise on software piracy issues in FBI offices and U.S. Attorneys' offices around the country? What efforts are being made to upgrade the Department's capabilities to investigate and prosecute software piracy, and to evaluate cases brought to the Department's attention by the software industry?

ANSWER: With respect to copyright prosecutions for computer software piracy, we are unable at this time to assess what action is needed to improve the Department's investigative and prosecutive capabilities because very few infringement cases involving software counterfeiting have been brought to our attention. We anticipate that much of the technical assistance needed in these cases will be provided by the affected industry, as is currently the case with record, tape and motion picture piracy. You may be assured, however, that as more of these cases are brought to our attention we will take all appropriate action to ensure that our ability to investigate and prosecute this piracy remains unimpaired.

The Department currently provides a wide range of assistance to prosecutors in copyright cases involving the other areas, such as record, tape or motion picture piracy. Indeed, in the past attorneys from the Department's Criminal Division have worked with various United States Attorneys' offices in the prosecution of major copyright infringers. Most recently the Department played a substantial role in the prosecution in South Carolina of George Washington Cooper, III, a major distributor of counterfeit audio tapes.

7. Has the software industry been helpful to the Department in investigating cases, and in sharing technical knowledge with investigators and prosecutors? What could be done to strengthen this working relationship?

ANSWER: In 1981 representatives of the Department of Justice met with officials in the computer software industry to discuss the need for criminal enforcement of the copyright laws in this field. To date, however, the computer software industry has referred relatively few matters to the Department for criminal investigation. Therefore we are unable to assess the quality of this industry's assistance to the Department.

8. Are there other resources the Department needs in order to be able to prosecute software piracy cases more effectively?

ANSWER: Our experience in computer software piracy cases is currently too limited to enable us to determine what additional resources may be needed in the future to prosecute these cases more effectively.

U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

SAME LETTER SENT TO ALL UNITED STATES ATTORNEYS

MAY 7 1985

Mr. Frank W. Donaldson
United States Attorney
200 Federal Building
1800 Fifth Avenue North
Birmingham, Alabama 35203

Dear Mr. Donaldson:

Re: Copyright Prosecutions

A 1984 addition to the United States Attorney's Manual regarding violations of the Copyright Act, 17 U.S.C. 506(a) has apparently caused some confusion as to Department of Justice prosecutive policy. This letter is written to clarify any misunderstandings that may have occurred and to direct your attention to the enclosed new Section 9-71.400 of the United States Attorney's Manual on this Act.

The previous §9-71.400, promulgated May 1984, discusses civil remedies as a method of deterrence. This language has been incorrectly interpreted by some as suggesting that, notwithstanding the merits, worthy cases may be declined in favor of civil remedies. The confusion evidently was exacerbated by Department of Justice white collar crime guidelines, promulgated in 1980 which are no longer in use.

Felony provisions for copyright violations were enacted in 1982 because the misdemeanor penalties in Chapter 17 were insufficient to deal with the proliferation of piracy and counterfeiting, and because felony penalties increase returns on prosecutorial and investigative commitments of resources. The purpose of discussing civil remedies in the previous §9-71.400 was to remind prosecutors of the existence of a civil approach where it could be adequate to deter a suspect or where there were evidentiary or legal problems proving intent or infringement. Civil remedies were not discussed as a justification for declining a meritorious case in which criminal sanctions were clearly warranted and necessary. Consequently, all meritorious cases which fall within the parameters of the felony statutes (18 U.S.C. 2318 and 2319) should receive serious consideration. Of course, where there is reasonable concern about substantive legal issues or where proof of criminal intent is insufficient to overcome defenses, a civil action may be the better legal course.

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The following factors should be taken into account in assessing the appropriateness of criminal sanctions: intent, volume of activity [1/] and the potential defendant's role in the illegal process. [2/]

If you have any questions or if you have a meritorious case your office is unable to prosecute because of resource limitations, please contact the General Litigation and Legal Advice Section of the Criminal Division for assistance.

Sincerely,

Stephen S. Trott
Assistant Attorney General
Criminal Division

Enclosure

1/ The volume of counterfeited or pirated films or video tapes necessary to constitute a felony is less than that required for records and tapes. It should also be kept in mind that lesser volumes of felonious activity may lend themselves to the plea bargaining process in particular cases. Cf. 17 U.S.C. §506.

2/ It is ordinarily less difficult to prosecute successfully a manufacturer of the counterfeits or pirated works than others in the chain of distribution since possession and use of elaborate duplicating equipment, many blank cassetts or labels, for example, are usually good evidence of criminal intent. Moreover, a manufacturer of illegal works ordinarily does not have defenses available to him that others in the chain of distribution would have, such as lack of knowledge the items were unauthorized duplications.

Senator MATHIAS. Our next witness is Donald C. Curran, Acting Register of Copyrights, Library of Congress.

Mr. Curran, it is a pleasure to have you back again with the committee, another old friend, and if you would just introduce your associates for the record.

STATEMENT OF DONALD C. CURRAN, ACTING REGISTER OF COPYRIGHTS, COPYRIGHT OFFICE, LIBRARY OF CONGRESS, ACCOMPANIED BY DOROTHY SCHRADER, ASSOCIATE REGISTER OF COPYRIGHTS FOR LEGAL AFFAIRS, AND MARILYN KRETSINGER, SENIOR ATTORNEY-ADVISER

Mr. CURRAN. Thank you, Mr. Chairman.

Accompanying me are Dorothy Schrader, associate register of copyrights for legal affairs, and Marilyn Kretsinger, senior attorney-adviser in our counsel's office.

Mr. Chairman, members of the subcommittee, we are, of course, pleased to be here today. My summary is a brief summary and it will confine, I think, itself to approximately 5 minutes. Of our larger statement, which we have submitted for the record, which under the previous——

Senator MATHIAS. Under the previous order it will be included as part of your testimony.

Mr. CURRAN. Thank you, Mr. Chairman.

In general, the Copyright Office finds that the civil and criminal remedies are strong and effective. The civil remedies were enacted in the Copyright Act of 1976, and the criminal penalties for motion picture and sound recording piracy were substantially increased by amendments enacted in 1982.

Civil enforcement of the copyright law is the responsibility of the authors and copyright owners. Criminal enforcement is the responsibility of the Department of Justice and the local U.S. attorneys, as we have just heard.

The Copyright Office is not aware of any major problem with the practical effectiveness of the civil remedies.

Senator MATHIAS. Excuse me. Practical?

Mr. CURRAN. Practical effect of the civil remedies.

We, therefore, have no recommendations for legislative changes or for modification of court rules or Federal Government policy concerning those civil remedies.

With the very substantial increases in criminal penalties enacted in 1982, law enforcement authorities would appear to have the necessary statutory tools to combat massive, organized piracy. The Copyright Office supports the vigorous enforcement of the criminal law against such large-scale operations, although we recognize that prosecutors have difficult decisions to make in allocating their sometimes scarce resources.

The remedies available under the 1976 Copyright Act include injunctions, impounding and disposition of infringing article, actual damages and profits or statutory damages, attorneys' fees, fines and imprisonment for criminal offenses, seizure and forfeiture and deprivation of the benefit of a compulsory license for one or more distant signals as an additional remedy of alteration of programming like cable systems. The criminal infringement penalties can

be enforced against "any person who infringes a copyright willfully and for purposes of commercial advantage or private financial gain."

As a rule, injunctive relief is readily available. Preliminary injunctions are commonly issued, based on the prima facie evidentiary weight of the certificate of copyright registration. Substantial monetary relief is available, based on proof of actual damages and profits attributable to the infringement or, absent that proof, in the form of statutory damages.

In the case of willful commercial piracy, the potential statutory damages award is enormous. Recently, five record companies won a statutory damages award of nearly $2 million, $25,000 per infringement for 79 copyright infringements. In another case, nearly $1.5 million in statutory damages were awarded for the manuacturer of counterfeit tapes and records. In addition to monetary compensation, the remedies of seizure and impoundment of infringing articles are very powerful, and as far as the Copyright Office is aware, have been effective.

The remedies available under the U.S. copyright law compare very favorably with, and almost always exceed, the remedies available under foreign copyright laws. Moreover, the public registration-recordation system of our copyright law accords certain procedural advantages to copyright owners in infringement suits. With this combination of powerful remedies and procedural advantages, the Copyright Act appears to give authors and copyright owners the tools needed to enforce their rights, assuming copyright infringement can be proved.

Our comments on criminal remedies: the original 1976 act provided up to a $10,000 fine and/or up to 1 year imprisonment for criminal infringement generally and up to $25,000 for criminal infringement of the copyright in a sound recording or motion picture. Subsequent offenses were punishable with up to a $50,000 fine and/or 2 years imprisonment.

In May 1982, Congress amended the law to provide stiffer penalties for criminal infringement. It now provides that a criminal infringer "shall be punished as provided in section 2319 of title 18." For extensive piracy of sound recordings or motion pictures, 18 U.S.C. 2319(b) provides a maximum fine of $250,000 and/or 5 years imprisonment.

The Copyright Office is not directly involved with the enforcement of the criminal penalties of the Copyright Act. We, therefore, cannot provide precise information about cases, sentences, and law enforcement effectiveness. We have, however, attempted to assess developments since the 1982 amendments by reviewing published articles, court opinions, trade press, and statistics furnished by the sound recording and motion picture industries. Representatives of these industries seem to believe the number of prosecutions of criminal cases have declined from the levels attained in 1980.

With respect to sentencing of those convicted, the effects of the 1982 amendments to the Copyright Act and the Criminal Code are not totally clear, particularly since very few appellate opinions to date concern sentences imposed under those amendments. A review of available information suggests that a trend toward longer periods of incarceration may exist.

The number of arrests and convictions and length of sentences imposed should not be the sole measure of effectiveness of law enforcement. The quality of the enforcement is equally, if not more important. Are the major offenders punished? During the past 3 years, extensive investigations based on cooperation between the public and private sector seem to have resulted in more vigorous prosecution of major violators. The Copyright Office fully supports and encourages vigorous enforcement of the criminal infringement provisions against such major offenders.

We thank you for the opportunity to present our views and, of course, those views can be expanded in our longer article, and we are prepared to answer your questions and develop any points which you would like to have us do.

[The following statement was received for the record:]

PREPARED STATEMENT OF DONALD C. CURRAN

SUMMARY

Mr. Chairman and members of the Subcommittee, I am pleased to appear before you today to comment on the adequacy and availability of existing civil and criminal remedies for copyright infringement.

In general, the Copyright Office finds that the civil and criminal remedies are strong and effective. The civil remedies were enacted in the Copyright Act of 1976, 17 U.S.C. §501 et seq., and the criminal penalties for motion picture and sound recording piracy were substantially increased by amendments enacted in 1982. The remedies include, injunctions (§502); impounding and disposition of infringing articles (§503); actual damages and profits or statutory damages (§504); attorney's fees (§505); fines and imprisonment for criminal offenses (§506); seizure and forfeiture (§509) and deprivation of the benefit of a compulsory license for one or more distant signals as an additional remedy for alteration of programming by cable systems (§510).

Civil enforcement of the copyright law is the responsibility of the authors and copyright owners. Criminal enforcement is the responsibility of the Department of Justice and the local United States Attorneys.

The Copyright Office believes that the existing civil remedies are strong, and we are not aware of any major problem with their practical effectiveness. The Office therefore has no proposal for legislative change or for modification of court rules or federal government policy. As a rule, injunctive relief is readily available; preliminary injunctions are commonly issued, based on the prima facie evidentiary weight of the certificate of copyright registration. Substantial monetary relief is available, either based on proof of actual damages and profits attributable to the infringement or in the form of statutory damages, absent that proof. In the case of wilful, commercial piracy, the potential statutory damages award ($50,000 per work) is enormous.

With the very substantial increase in criminal penalties enacted in 1982, ($250,000 maximum fine and five years in jail, in some cases), law enforcement authorities would appear to have the necessary statutory tools to combat massive, organized piracy. The Copyright Office supports the vigorous enforcement of the criminal law against such large-scale operations, although we recognize that prosecutors have difficult decisions to make in allocating their sometimes scarce resources.

* * *

Mr. Chairman and members of the Subcommittee, I am Donald C. Curran, Acting Register of Copyrights. I am pleased to appear before you today to comment on the adequacy and availability of existing remedies for copyright infringement, including both private civil actions and enforcement by criminal prosecution.

In general, the Copyright Office finds that the civil and criminal remedies are strong and effective. The civil remedies were enacted in the Copyright Act of 1976, and the criminal penalties for motion picture and sound recording piracy were substantially increased by amendments enacted in 1982.

Civil enforcement of the copyright law is the responsibility of the authors and copyright owners. Criminal enforcement is the responsibility of the Department of Justice and the local United States Attorneys.

The Copyright Office is not aware of any major problem with the practical effectiveness of the civil remedies, and we therefore have no proposals for legislative changes or for modification of court rules or federal government policy.

With the very substantial increase in criminal penalties enacted in 1982, law enforcement authorities would appear to have the necessary statutory tools to combat massive, organized piratical enterprises. The Copyright Office supports the vigorous enforcement of the criminal law against such large-scale operations, although we recognize the prosecutors have difficult decisions to make in allocating their sometimes scarce resources.

I will first summarize the existing civil and criminal remedies, make brief comments on the practical effectiveness of the civil remedies, and then comment on criminal enforcement since the 1970's.

I. THE CIVIL AND CRIMINAL REMEDIES AVAILABLE UNDER THE 1976 COPYRIGHT ACT

The remedies that exist under the 1976 Copyright Act are set out in 17 U.S.C. §501 et seq.1/ The remedies available include, injunctions (§502); impounding and disposition of infringing articles (§503); actual

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1. In addition to the remedies set out in the Copyright Act, almost all states have enacted criminal sanctions against piracy of records and tapes. Latman, The Copyright Law 251 (5th ed. 1979) [see State Antipiracy Legislation, 23 BULL. COPYRIGHT SOC'Y. 321 (1976)].

damages and profits or statutory damages (§504); attorney's fees (§505); fines and imprisonment for criminal offenses (§506); seizure and forfeiture (§509); and deprivation of the benefit of a compulsory license for one or more distant signals as an additional remedy for alteration of programming by cable systems (§510).

Certain but not all civil infringements of copyright also constitute criminal infringement. The distinction between a civil and criminal infringement can be found in 17 U.S.C. §506(a) which provides "any person who infringes a copyright willfully and for purposes of commercial advantage or private financial gain shall be punished as provided in section 2319 of title 18."2/ (Emphasis added). Section 506 was amended in 1982; while the amendment did not change the definition of criminal infringement it did increase the penalties substantially.

The simplest way to summarize the civil and criminal remedies available under the 1976 Act is to follow the order established by Congress when it enacted the 1976 Act.

Section 502. Injunctions. The issuance of injunctions in a copyright action is discretionary with the court.3/ Subject to the provisions of section 1498 of title 28 (dealing with unavailability of injunctions in infringement actions against the United States), any court having jurisdiction of a civil action arising under title 17 may grant a temporary or a final injunction "on such terms as it may deem reasonable to prevent or restrain infringement of a copyright." §502(a).

A preliminary injunction may be issued upon the filing of a copyright action to restrict further violation of the copyright in issue, and a permanent injunction may be obtained when the plaintiff prevails in a copy-

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2. Pub. L. 97-180, §5, May 24, 1982, 96 STAT. 93.

3. The House Report notes that §502(a) "reasserts the discretionary power of courts to grant injunctions and restraining orders, whether 'preliminary,' 'temporary,' 'interlocutory,' 'permanent,' or 'final,' to prevent or stop infringements of copyright." H. Rep. No. 1476, 94th Cong., 2d Sess. 160 (1976) [hereafter H. Rep. No. 1476].

right infringement action. Ordinarily a permanent injunction is not granted unless there is a threat or probability of continued or additional infringement.

Section 502(b) ensures that a copyright owner who has obtained an injunction in one state will be able to enforce it against a defendant located anywhere else in the United States.

Section 503. Impounding and Disposition of Infringing Articles. The two subsections of section 503 deal respectively with the courts' power to impound allegedly infringing articles during the time an action is pending, and to order the destruction or other disposition of articles found to be infringing. In both cases the articles affected include "all copies or phonorecords" which are claimed or found "to have been made or used in violation of the copyright owner's exclusive rights," and also "all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced." The alternative phrase "made or used" in both subsections enables a court to deal as it sees fit with articles which, though reproduced and acquired lawfully, have been used for infringing purposes such as rentals, performances, and displays.

Articles may be impounded under subsection (a) "at any time while an action under this title is pending," thus permitting seizures of articles alleged to be infringing as soon as suit has been filed and without waiting for an injunction. The same subsection empowers the court to order impounding "on such terms as it may deem reasonable."

Section 503(b) gives "the court discretion to order destruction or other reasonable disposition of the articles found to be infringing. Thus, as part of its final judgment or decree, the court could order the infringing articles sold, delivered to the plaintiff, or disposed of in some other way that would avoid needless waste and best serve the ends of justice." H. Rep. No. 1476, supra, at 160.

Section 504. Damages and Profits. This provision provides for

monetary recovery and in so doing distinguishes actual damages, profits, and statutory damages.

The House Report notes that subsection (a)

> [L]ays the groundwork for the more detailed provisions of the section by establishing the liability of a copyright infringer for either 'the copyright owner's actual damages and any additional profits of the infringer,' or statutory damages. Recovery of actual damages and profits under section 504(b) or of statutory damages under section 504(c) is alternative and for the copyright owner to elect... the plaintiff in an infringement suit is not obliged to submit proof of damages and profits and may choose to rely on the provision for minimum statutory damages. However, there is nothing in section 504 to prevent a court from taking account of evidence concerning actual damages and profits in making an award of statutory damages within the range set out in subsection (c).
>
> ... In allowing the plaintiff to recover 'the actual damages suffered by him or her as a result of the infringement,' plus any of the infringer's profits 'that are attributable to the infringement and are not taken into account in computing the actual damages,' section 504(b) recognizes the different purposes served by awards of damages and profits. Damages are awarded to compensate the copyright owner for losses from the infringement, and profits are awarded to prevent the infringer from unfairly benefiting from a wrongful act. Where the defendant's profits are nothing more than a measure of the damages suffered by the copyright owner, it would be inappropriate to award damages and profits cumulatively, since in effect they amount to the same thing. However, in cases where the copyright owner has suffered damages not reflected in the infringer's profits, or where there have been profits attributable to the copyrighted work but not used as a measure of damages, subsection (b) authorizes the award of both.

Id. at 161.

Section 504(c) emphasizes that the plaintiff may choose to recover statutory damages at any time during the trial before the court has rendered its final judgment. It also sets out the minimum and maximum limitations within which a court makes this discretionary award.

Section 504(c)(1) sets out a minimum award of $250 and a maximum one of $10,000. Exceptions to these limits are set out in §504(c)(2) which permits a court to reduce the award to not less than $100 when the infringer proves that he/she "was not aware and had no reason to believe that his or her acts constituted an infringement of copyright." It also

permits a court to increase the award of statutory damages to not more than $50,000 where the copyright owner proves and "the court finds, that infringement was committed willfully." This section also permits the court to remit any statutory damages in certain situations where the "infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107...."

A rather complicated scheme is worked out by the language in §504(c)(1), "an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally...." This permits the court to multiply the award of statutory damages if separate copyrighted works and/or separate infringing acts are involved, but excludes multiple awards for the same basic work and its derivatives. This scheme is explained in the House Report at 162.

Unless the situation is one involving the exceptions specified in 17 U.S.C. §412, registration of the copyright is a condition precedent to the awarding of statutory damages. There has been some discussion as to whether the judge or the jury should determine the amount of statutory damages awarded. Nimmer feels that the better view is for the judge to set the amount even if other issues are for the jury to decide.4/

Section 505. Costs and Attorney's Fees. In any civil action the court has the discretion to award attorney's fees and costs against or to any party but the United States or an officer thereof. Nimmer notes that the award of attorney's fees is subject to registration of copyright, to the prevailing party, to a reasonable attorney's fee, and, furthermore, is usually awarded only when there is some element of moral blame against the losing party. Nimmer, supra, §14.10.

Section 506. Criminal Offenses. The four types of criminal offenses actionable under the Copyright Act are: willful infringement for

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4. 3 NIMMER ON COPYRIGHT §14.04(c) (1984). A detailed explanation of the civil and criminal remedies available can be found in 3 NIMMER Chapters 14 and 15.

profit, §506(a); fraudulent use of a copyright notice, §506(c); fraudulent removal of notice, §506(d); and false representation in connection with a copyright application, §506(e). As of 1981 there were no reported cases applying either the current §§506(c) and (d) or their 1909 predecessor §105.

As enacted in 1976, section 506(a) provided up to a $10,000 fine and/or up to one year imprisonment for criminal infringement generally and up to $25,000 for criminal infringement of the copyright in a recording or motion picture with up to a $50,000 fine and/or two year imprisonment for any subsequent offense.

In May of 1982 Congress amended §506(a) to provide stiffer penalties for criminal infringement. Section 506(a) now says that a criminal infringer "shall be punished as provided in section 2319 of title 18." The 1982 amendment was part of the Piracy and Counterfeiting Amendments Act of 1982 which amended titles 18 and 17 of the United States Code in order to strengthen the law against record, tape, and film piracy and counterfeiting. Section 2 of this Act amended existing §2318 of title 18 to provide stiffer penalties for trafficking in counterfeit labels for phonorecords, and copies of motion pictures or other audiovisual works. Section 3 amended title 18 by inserting a new section, §2319. Section 2319 concerns criminal infringement of a copyright, and it provides penalties for a 17 U.S.C. 506(a) criminal offense "in addition to any other provisions of title 17 or any other law." Section 2319(b) provides up to a $250,000 fine and/or a five year prison sentence for the reproduction or distribution, during any 180 day period of (1) at least one thousand phonorecords infringing the copyright in one or more sound recordings, or (2) at least 65 copies infringing the copyright in one or more motion pictures or other audiovisual works, or (3) a second or subsequent offense under either (b)(1) or (b)(2) where a prior offense involved a sound recording, or a motion picture or other audiovisual work.

Section 2319(b)(2) provides for up to a $250,000 fine and/or a

two year prison sentence for reproduction or distribution during any 180 day period of (1) more than 100 but less than 1000 phonorecords infringing the copyright in one or more sound recordings; or (2) more than 7 but less than 65 copies infringing the copyright in one or more motion pictures or other audiovisual works.

Section 2319(c) provides for up to a $25,000 fine and/or one year prison sentence for any other case of §506(a) criminal infringement of a copyright.

Sections 506(b) and 509. Seizure and Forfeiture. In a conviction for criminal copyright infringement under 17 U.S.C. §506(b) the court must "order the forfeiture and destruction or other disposition of all infringing copies or phonorecords and all implements, devices, or equipment used in the manufacture of such infringing copies or phonorecords." Section 503(b) provides a similar but discretionary remedy for a civil infringement by providing that the court "may order the destruction or other reasonable disposition of all copies or phonorecords...."

Section 509(a) provides that copies or phonorecords "used, intended for use, or possessed with intent to use in violation of section 506(a), and all (... equipment) or other articles by means of which such copies or phonorecords may be reproduced ... may be seized and forfeited to the United States." It is unclear whether this contemplates seizure prior to a judgment of infringement. Section 509(b) relates to seizure and judicial forfeiture in relation to the customs law contained in title 19.

Section 510. Remedies for Alteration of Programming by Cable Systems. The House Report explains the remedies available to a plaintiff bringing an action under 17 U.S.C. §111(c)(3).

> Section 509(b) specifies a new discretionary remedy for alteration of programming by cable systems in violation of section 111(c)(3): the court in such cases may decree that, "for a period not to exceed thirty days, the cable system shall be deprived of the benefit of a compulsory license for one or more distant signals carried by such cable system." The term "distant signals" in this provision is intended to have a meaning consistent with the definition of "distant signal equivalent" in section 111.

> Under section 509(a), four types of plaintiffs are entitled to bring an action in cases of alteration of programming by cable systems in violation of section 111(c)(3). For regular copyright owners and local broadcaster-licensees, the full battery of remedies for infringement would be available. The two new classes of potential plaintiffs under section 501(d)--the distant-signal transmitter and other local stations--would be limited to the following remedies: (i) discretionary injunctions; (ii) discretionary costs and attorney's fees; (iii) any actual damages the plaintiff can prove were attributable to the act of altering program content; and (iv) the new discretionary remedy of suspension of compulsory licensing.

H. Rep. No. 1476 at 164.

II. COMMENTS ON CIVIL REMEDIES FOR COPYRIGHT INFRINGEMENT

The Copyright Office believes that the existing remedies against civil infringement of copyright are strong and effective. As a rule, injunctive relief is readily available; preliminary injunctions are commonly issued, based on the prima facie evidentiary weight of the certificate of copyright registration. Substantial monetary relief is available, either based on proof of actual damages and profits attributable to the infringement or in the form of statutory damages, absent that proof. In the case of willful, commercial piracy, the potential statutory damages award is enormous. Recently five record companies won a statutory damages award of nearly two million dollars5/ ($25,000 per infringement for 79 copyright infringements), and nearly one and one-half million dollars in statutory damages was awarded in another case for the manufacture of counterfeit tapes and records.6/ In addition to monetary compensation, the remedies of seizure and impoundment of infringing articles are very powerful, and as far as the Copyright Office is aware, have been invoked effectively. In fact, it is sometimes possible, in the context of a temporary restraining order and a sufficient posted bond, to obtain ex parte seizure

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5. Billboard (May 26, 1984) 6.

6. Billboard (October 31, 1984) 92.

of infringing articles before the alleged infringer has an opportunity to destroy the evidence or flee the jurisdiction.

Without question, the remedies available under the United States copyright law compare very favorably with, and almost always exceed, the remedies available under foreign copyright laws. Moreover, the public registration-recordation system of our copyright law accords certain procedural and evidentiary advantages to copyright owners in infringement suits. With its combination of powerful remedies and procedural advantages, the Copyright Act appears to give authors and copyright owners the weapons needed to enforce their rights, assuming copyright infringement can be proved.

The larger problem faced by authors and copyright owners concerns the scope of exclusive rights, and whether certain acts of reproduction, public distribution, or public performance, especially, should be considered copyright infringement. This is an issue beyond the scope of today's hearing.

III. CRIMINAL SANCTIONS FOR COPYRIGHT INFRINGEMENT

A. Introduction

Although criminal sanctions have been available for copyright infringement since the 1909 Act, and in a quite limited way even before,7/ these sanctions were seldom invoked before the 1970's. Several reasons have been given for the failure to use these sanctions earlier:

1. Little legislative history to guide attorneys.
2. Belief that federal civil remedies, including statutory damages, provided sufficient punishment to copyright infringers.
3. Belief that criminal penalties were too slight, even when employed, to be effective deterrents.
4. Liberalizing the rights of defendants, increased the burdens of criminal prosecution; therefore, lawyers

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7. See, Young, Criminal Copyright Infringement and a Step Beyond, 30 COPYRIGHT L. SYMP. (ASCAP) 157, note 4 at 158 (1983).

tended to opt for the surer civil field whenever possible.8/

By the 1970's increased profits in the motion picture and sound recording industries and development of equipment that made duplication of these products easy and inexpensive made motion picture and record piracy quite profitable. The rapid expansion of this kind of piracy caused serious economic problems for these copyright proprietors who went to Congress to get legislation that would help them enforce their exclusive rights.

Congress responded in 1976 by enacting §506(a) which contained "a special provision applying to any person who infringes willfully and for purposes of commercial advantage the copyright in a sound recording or a motion picture." H. Rep. No. 1476 at 163. In 1981 these proprietors again appeared before Congress to urge that existing criminal penalties for piracy and counterfeiting9/ should be strengthened. At this time the counterfeiting and piracy of motion pictures, records, and tapes was described as "a highly sophisticated business that has grown into a billion dollar a year industry."10/

Mr. Bouras of the Motion Picture Association of America (hereafter MPAA) urged that "civil remedies and sanctions have proved completely ineffective in dealing with large-scale pirates and counterfeiters." And he testified that "the respective experience of MPAA and RIAA show that piracy and counterfeiting of motion pictures and sound recordings is grow-

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8. Id. at 158-159, citations omitted.

9. Piracy is the unauthorized duplication of original commercial products. Counterfeiting is the forging of the packaging and labeling of the original product. Bootlegging is the industry term used for the unauthorized duplication and sale of video and audio tapes or cassettes.

10. The Piracy and Counterfeiting Amendments Act of 1981: Hearings on S. 691 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 26 (1981) (statement of James Bouras, Vice President and Deputy General Attorney, Motion Picture Association of America, Inc.).

ing by leaps and bounds, and that the penalties provided in current law are totally inadequate to deal with these lucrative crimes."11/

Congress responded by enacting the Piracy and Counterfeiting Amendment of 1982 which made the fine for piracy and counterfeiting stiffer and provided a longer maximum prison sentence that would make this piracy or counterfeiting a felony crime.

With the exception of motion picture and sound recording piracy it remains true that the criminal sanctions of the copyright law have almost never been invoked. Primarily, this is because the civil remedies are considered adequate to ensure a reasonable level of compliance with the law.

B. Effectiveness of the Current Criminal Remedies

The increased criminal penalties went into effect on May 24, 1982. It is possible to examine accounts of investigations, complaints, and convictions, and also the reported cases during the last three years and get some perception of the "adequacy and availability" of these remedies.

1. Increased Awareness of Criminal Sanctions

Even before the new criminal penalties went into effect in 1982, the industries were becoming more vigilant in prosecuting civil and criminal actions. Both the Motion Picture Association of America (MPAA) and the Recording Industry Association of America (RIAA) have cooperated with federal and state officials in investigating leads concerning piracy and counterfeiting.

Passage of the 1982 bill led to even greater efforts to curb domestic and worldwide piracy. See, e.g., Hollywood Reporter (June 8, 1982) 1, 4; Washington Post (July 20, 1982) at C-5. In April of 1983 North Carolina FBI agents confiscated more than 1,400 pirated videocassettes of motion pictures and television shows with an estimated value of $1,000,000.

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11. Id. at 21, 22.

The FBI was assisted by representatives from MPAA and RIAA. Robert Pence, the agent in charge, said, "We made those raids for two reasons: One, we hope the evidence will bring a grand jury indictment; and, two, we want to send a signal to people that this act is a felony."12/ On July 18, 1983, four of the seven men charged were sentenced to fines ranging from $150 to $1,000 and two of the men to two years probation.13/ Two other men were tried before a jury. One, the first to be sentenced under the 1982 amendment was sentenced to two years in prison, fined $5,000 and required to reimburse the victimized diskeries $1,478. The other man charged with one misdemeanor count of criminal copyright infringement and four counts of trafficking in counterfeit labels was sentenced to one year in prison, five years probation, and a $1,000 fine.14/

Successful raids were conducted throughout the United States where pirated or counterfeited motion pictures, records, and tapes and equipment were seized.15/

2. Sentences Imposed Under §506

During these raids allegedly pirated tapes, records, or videocassettes and equipment were confiscated; frequently the raid led to arrests. On October 5, 1982, following "extensive" investigation, the FBI made the

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12. Variety (April 27, 1983) 113, 114.

13. Variety (July 27, 1983) 39.

14. Variety (Aug. 22, 1984) 117, 120.

15. A partial listing of these raids includes the following for sound recordings: Arizona, in the largest "bootleg" cassette operation ever, 5,600 master audio tapes were seized in February of 1984, Variety (March 14, 1984) 127; California and Kentucky, more than 22,000 allegedly illegal records and tapes, Variety (June 2, 1982) 73; Connecticut, more than 1,000 master tapes and bootleg albums, Cash Box (Jan. 15, 1983) 18; Florida, more than 7,000 illicit tapes and records, Variety (March 23, 1983) 77; Arkansas, New Jersey, Connecticut, approximately 393,000 allegedly pirated records and tapes, Daily Variety (May 4, 1983) 11; Oklahoma, Billboard (Jan. 7, 1984) 54. During the same period the following raids resulted in the confiscation of: New York, 80 pirated videocassettes, Variety (May 11, 1983) 83; Michigan, 1,250 pirated videocassettes, Variety (Jan. 26, 1984) 28; Arkansas, 125 videocassettes; Indiana, 85; Michigan, 141; Oklahoma, 339. MPAA Anti-piracy Newsletter (January 1, 1985) 2.

first arrests under the amended law. Two men, one a repeat offender, were charged with illegally duplicating and selling videocassettes of copyrighted movies.16/

Initially courts appeared somewhat reluctant actually to impose a prison sentence under the new law; almost all convicted offenders were fined but received a probated or suspended sentence. Gradually more actual prison sentences were imposed on repeat offenders. In September of 1983, a Florida man, Lee Cash, charged with one count of stolen property and twelve counts of copyright infringement was sentenced to three years and fined $10,000.00.17/ On August 27, 1984, George Washington Cooper, who had been repeatedly involved in massive "bootlegging" activities, was given 12 consecutive one-year terms, the longest prison sentence ever given in a case of this kind and a $25,000 fine. Cooper was convicted of nine counts of copyright infringement and one count of conspiracy.18/ It should be noted that this was Cooper's third conviction for criminal copyright infringement. When he was arrested, he was out on an appeal bond from his two previous convictions .19/

Substantial fines have also been imposed; however, none of them so far have reached the $250,000 maximum. It is difficult to determine the extent to which fines are heavier now than prior to the 1982 amendment since the amount of the fines assessed is keyed to the scale of defendant's operation and his/her prior copyright infringement. It may also be heavier where the defendant(s) is also being charged with other violations of the

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16. Hollywood Reporter (Oct. 8, 1982) 4.

17. Variety (April 11, 1984) 91.

18. Variety (Sept. 12, 1984) 44.

19. Variety (Aug. 22, 1984) 117 at 120. In 1980 in South Carolina Cooper was convicted on one count of criminal copyright infringement and received a one-year sentence, suspended for 6 months, a $5,000 fine and five years of probation. In 1981 in Florida Cooper was convicted of (RICO) violations, copyright conspiracy, and wire fraud and received a nine-year sentence which was affirmed by the 11th Circuit. Variety (July 4, 1984) 67, 73.

law.20/ A $10,000 fine and 2 years probation was recently imposed on an Oklahoma TV & Appliance dealer who entered a guilty plea following the seizure of 230 unauthorized videocassettes.21/ Two California defendants who were convicted for licensing motion picture titles to military institutions in Europe were fined $25,000 and 5,000 respectively and received a probated sentence.22/ The Ninth Circuit has affirmed these convictions and published the opinion to insure that their defense that they were government contractors insulated from criminal copyright infringement would not be repeated.23/ Three Alabama men received fines ranging from $1,000 to $5,000, and a Californian was fined $10,000.24/

Perhaps the best way to assess whether or not progress has been made in curbing piracy is to compare the statistics released by MPAA and RIAA concerning investigations, arrests, and convictions prior to and following the 1982 amendment. From 1975 to June 1981, there were 166 criminal convictions for motion picture and video tape piracy in the United States; only 26 resulted in jail sentences. During this same period, prosecutions were declined in more than 530 cases.25/ Mr. Richard Bloesser, Director of the Film Security Office of the MPAA, reports that some jurisdictions have refused to prosecute criminal copyright cases since the revision of Justice Department guidelines which went into effect in October of 1980.26/ He gives the following statistics to support his contention that a prosecution has occurred. The Copyright Office presents

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20. See text infra at 20-22.

21. 1984 Composite of Worldwide Antipiracy Newsletter, item 19.

22. Id., item 17.

23. MPAA Antipiracy Newsletter (February 25, 1985) 3.

24. MPAA Antipiracy Newsletter (December 5, 1984) 2.

25. The Piracy and Counterfeiting Amendments Act of 1981: Hearings on S. 691 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 21 (1981).

26. Three guidelines are discussed at page 22 infra.

these statistics as a means of informing the Subcommittee of a private sector point of view, but we do not draw any conclusions from the data.

	Videocassettes seized by FBI	Criminal Convictions
1980	16,600	62
1981	21,900	71
1982	16,300	71
1983	15,100	43
1984	14,200	36

(telephone conversation April 11, 1985).

In 1983 the MPAA's Film Security Office (FSO) reported:

Cases currently pending	877
Cases opened	728
Seizures, arrests, indictments	53
Convictions	43
Prints seized (Crim.)	172
Cassettes seized (Crim.)	15,135
Cease/desist letters sent	192
Civil cases filed	27
Prints seized (civil)	566
Cassettes seized (civil)	1,578

For the first half of 1984 the FSO reported:

Convictions	21
Videocassettes seized	11,688
Film prints seized	100
Raids	31
Cases pending prosecution	38
Total number of cases currently pending investigation	712 27/

RIAA reports that following about 1400 leads concerning criminal piracy, their own investigation found about 400 violations; of these they referred 26 cases to the Justice Department for criminal prosecution and 21 were prosecuted and convicted. RIAA is selective in what they refer to Justice, turning over only the most egregious cases. (Telephone conversation with Joel Schoenfield, RIAA special antipiracy counsel, April 9, 1984).

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27. MPAA's 1984 Composite Report of Worldwide Antipiracy Newsletter. Will Nix, MPAA Vice President and Deputy General Attorney reported that in 1984 the MPAA was involved in the seizure of 14,000 pirated videocassettes, participated in 920 investigations and 28 criminal cases, and helped spur 50 raids around the country. The work resulted in 41 criminal convictions and 14 favorable civil decisions. Billboard (March 2, 1985) 27, 33.

Recently, RIAA reported that illegal sound and video recordings, raw materials and parts seized by the FBI, state and local law enforcement agencies in 1984 alone would have cost the legitimate industry more than $78,000,000 in lost sales. RIAA also noted that this figure represented a significant increase in antipiracy activity as compared to 1983.28/

A great deal of cooperation is needed in order to prosecute successfully either a motion picture or sound recording case. This cooperation can be seen in the way that MPAA and RIAA work together,29/ and with federal, state, and local officials. Every state but Vermont now has sound recording anti-piracy legislation (telephone conversation with Joel Schoenfield). On January 1, 1984, California's anti-counterfeiting law, the first such state law, went into effect. While the bill has no criminal sanctions, it requires convicted counterfeiters to pay legitimate trademark owners up to three times the profits realized on the sale of unauthorized or pirated merchandise, three times established damages, plus court costs and reasonable attorneys' fees.30/

In February of 1984, Richard Bloesser, reporting on the status of their anti-piracy campaign, stated that officials offered reward money up to $5,000 for information leading to film pirates. He also noted efforts to prevent piracy including tightening security and attempting to enlist the cooperation of exhibitors.31/

3. Comparison of Sentencing Under §506 Before and After 1982 Amendment

Because the Copyright Office is not directly involved with the prosecution of criminal copyright cases, it can not provide precise information about the number of such cases brought or the sentences imposed upon

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28. Billboard (February 16, 1985) 1, 84.

29. See, e.g., Billboard (March 2, 1985) 27.

30. Variety (January 4, 1984) 3, 29.

31. Variety (February 29, 1984) 7.

conviction. Statistics have been provided by the RIAA and the MPAA. These statistics do not reveal whether courts are imposing stiffer sentences. A review of all of the criminal cases reported since 1979 does reflect certain developments, but it should be borne in mind that more defendants are indicted than tried, that most trials do not result in the publication of an opinion by the trial or even the appellate court, and that published opinions do not always describe sentences imposed by the trial court. Thus this brief overview is not a scientific survey and should be treated more as a collection of anecdotes than as a set of statistics.

The effects of the 1982 amendments to the Copyright Act and the Criminal Code, which make certain criminal infringements felonies rather than misdemeanors32/ are not totally clear, particularly since very few appellate opinions to date concern sentences imposed under those amendments. But a trend toward longer periods of incarceration may exist: in two cases reported by the Seventh Circuit in 1980, United States v. Berkwitt, 614 F.2d 649, and United States v. Heilman, 614 F.2d 1133, substantial record and tape piracy convictions led to actual jail time of six months in each case, based on the suspension of much of the sentence in Berkwitt and the imposition of concurrent sentences in Heilman, while more recent cases involve longer sentences.

In United States v. Smith, 686 F.2d 234 (5th Cir. 1982), the defendant was sentenced to four consecutive one-year terms for criminal copyright infringement, under the prior law, and the Fifth Circuit's reversal of Smith's conviction on the charge of interstate transportation of stolen property did not reduce the jail time imposed, since the copyright and stolen property sentences were concurrent. In United States v. Gottesman, 724 F.2d 1517 (11th Cir. 1984), the defendant was sentenced to several concurrent 18-month terms. And in United States v. Dowling, 739 F.2d 1445 (9th Cir. 1984), cert. granted January 14, 1985, sentences of 18

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32. Pub. L. 97-180, 96 Stat. 92.

months would survive even a Supreme Court reversal of Dowling's conviction under the National Stolen Property Act (18 U.S.C. §2314) since certiorari was not granted as to Dowling's copyright or mail fraud convictions.

While the number of cases listed here is small, it may reflect a growing willingness of courts to impose tougher sentences on criminal copyright infringers than in the past.33/ Because criminal copyright cases often also include charges under Title 18 such as mail fraud (18 U.S.C. §1341), the Racketeer Influenced and Corrupt Practices Act (18 U.S.C. §1962), and the National Stolen Property Act (18 U.S.C. §2314), it is impossible to attribute the longer sentences reviewed here only to the attention given to copyright by the 1982 amendments. It would also seem to be premature to fear that those amendments have not worked, since there is some evidence that longer terms of incarceration for criminal infringers are being imposed.

C. Problems Encountered in Enforcing These Remedies

1. Common to Any Law Suit

Most of the reported suggestions of problems in enforcing these penalties are those common to any law suit, i.e., costs, reduced sentences for guilty pleas, or getting a monetary judgment in a civil action without being able to collect it.

2. Criminal Copyright Cases

One fear recently expressed has been the industry concern that

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33. In assessing the adequacy of criminal penalties for copyright "piracy" and the prosecutorial strategy chosen by U.S. law enforcement specialists, it is wise to recall that powerful punishments and deterrents to "piratical" activities exist by virtue of laws other than 17 U.S.C. Thus, criminal copyright infringement often involves violation of relevant conspiracy laws, e.g., U.S. v. Sherman, 576 F.2d 292 (10th Cir. 1978); anti-racketeering laws, wire fraud, U.S. v. La Monte, 455 F.Supp. 952 (E.D. Pa. 1978); interstate transport of stolen, converted or fraudulently obtained property, U.S. v. Whetzel, 589 F.2d 707 (D.C. Ca. 1978) (a case demonstrating the limitations of resort to 18 U.S.C. 2314 where the value of pirated audio recordings was relatively small). The significant penalties of 18 U.S.C. 2314 can most readily be applied to quantitatively large interstate shipments of copies of sound recordings and smaller quantities of video and film copies.

there is a lesser commitment on the part of the Justice Department to enforce the criminal sanctions following the May 24, 1984 revision of the United States Attorney's Manual (USAM) concerning prosecution of criminal copyright cases.34/

Mr. Bloesser of the MPAA reports less vigorous enforcement since the revision of the 1980 guidelines. These guidelines issued to U.S. attorneys made copyright infringement of motion pictures and sound recordings "a priority enforcement area, where the offense involves manufacturers or distributors, and distribution in three or more states or countries, and $500,000 or more in aggregate losses." (Letter D. Lowell Jensen, Assistant Attorney General, Criminal Division, Department of Justice to David Ladd, Register of Copyrights, July 1982). Even then, however, as with all litigation the Justice Department emphasized that, "In contrast to civil remedies, criminal prosecution stands as a last resort in the enforcement process." Id.

3. Increases of Related Kinds of Piracy.

One increasingly aggravating problem for cable television concerns individuals or businesses picking up the signal without paying for it. In New York state alone it is estimated that cable company operators lose $30 to $40 million in revenue a year to signal thieves. In 1983 New York state passed legislation making "theft of services" a Class A misdemeanor punishable with a fine up to $1,000 and up to a one-year prison sentence. Sophisticated technology makes it possible to determine when someone is picking up a signal without paying. Rather than bring suit most cable companies try to get the thieves to subscribe to the service.35/ Some suits are being brought for this so-called "theft of service."

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34. For example, there has been some feeling that emphasis on consideration of alternative remedies before instituting a criminal prosecution will lead to less vigorous prosecution on the part of the Justice Department. (Conversation with Joel Schoenfield, April 8, 1985); see also the report of meetings between industry and Justice representatives concerning those issues. MPAA's 1984 Composite of Worldwide Antipiracy Newsletter, item 99.

35. New York Times (Nov. 1, 1984) C-3.

Piracy of computer software is also rapidly escalating and copyright proprietors have sought legislation from Congress that would help them combat this kind of piracy. One proposal is that the stiffer penalties available for record, tape, and film piracy or counterfeiting should also apply to computer software.36/

Mr. Rubinstein, founder of Micropro International Corporation, estimates that his company loses $20 million to $40 million annually because of illegal reproduction. This kind of piracy may involve an individual making a copy for a friend or a merchant who seeks illegal copies at prices below retail.37/

Following a report that Rixon, Inc. had made unauthorized copies of a Lotus financial computer program for use in the Rixon branch offices, Lotus filed a copyright infringement suit asking for $10 million in damages. Rixon promptly settled for an undisclosed sum. In addition to the filing of such suits which are thought to be a method of deterrence through fear of exposure in the courts, software manufacturers are beginning to pool resources by formation of the Association of Data Processing Service Organization, with one committee to concentrate on legal enforcement and education on what is or is not illegal and another to strengthen antipiracy laws and to improve protection through technical security devices.38/

In view of the still-developing nature of the law regarding computer programs, the Copyright Office is inclined to believe that it would be premature to increase the penalties for computer program infringement. Another emerging issue concerns parallel imports. There has been a concentrated effort to prevent record store dealers from importing

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36. See, e.g. Rubinstein Micropro Will Take Software Pirates to Court, SOFTWARE NEWS, June 7, 1982.

37. New York Times (Jan. 5, 1983) D1, D7.

38. New York Times (July 31, 1984) D1, D4.

unauthorized albums, tapes, and compact discs.39/ This practice mushroomed into a serious problem in the early 1980's because dealers can buy the product for less and thus make a larger profit. Changes enacted in 1976 in the form of §602 (importation infringement) and §109 (First Sale Doctrine excluding protection for imports) were designed to give the recording industry the power to stop this problem. Customs cannot prevent nor confiscate legally manufactured foreign products from entering the U.S., but they can inform record companies who can then seek civil or criminal remedies under the Copyright Act. In the most significant recent case on parallel imports, the defendant Scorpio, argued that it was an "implied licensee" since CBS had given the Phillipine manufacturer, from whom Scorpio bought the albums, a license to manufacture the disks. The district court found for CBS but the case has been appealed.40/

D. Summation

An examination of the industry press, law review articles, and reported cases indicates that there are no problems with criminal remedies that are peculiar to copyright litigation. Although the Copyright Office has not received any complaints that criminal prosecution has diminished since the 1984 revision of the Justice manual, it is clear that sound recording and motion picture industry representatives feel enforcement has been less vigorous since the 1980 guidelines went into effect. It is, of course, probable that any complaints concerning enforcement would be directed to the Department of Justice rather than the Copyright Office.

While reports of raids and confiscation of pirated materials are quite common, it should be emphasized that the statistics suggest that there are many more pirates operating than are ever apprehended, that in many cases the evidence is destroyed before the alleged pirate can be

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39. See, e.g., Variety (Dec. 14, 1984); (July 20, 1983); (Aug. 3, 1983); MPAA Newsletter (January 11, 1985) 3.

40. Billboard, March 16, 1985, pp. 6, 71.

charged, and that only a small percentage of these cases result in a conviction. In a 1985 statement Will Nix reported that video piracy has been "checked" but not "stopped" in the U.S. via a combination of strict laws and film industry safeguards. Another source, Joe Moscaret, Vice President of film and video security at Paramount Pictures, reported that piracy has stabilized. "It has not increased per se; equally so, it has not decreased to any great measure." Nix and Moscaret concurred that video piracy in the form of professional theft of first-run feature films is under the greatest control in the U.S. and that public performances and signal theft are the major illegal drains on revenues. Areas where major motion picture piracy is still strong include New York, Chicago, Los Angeles, and North Carolina, known as a longtime record piracy hot spot.41/

A Justice Department representative testified at the 1981 hearing that passage of S. 691 would result in "a more vigorous effort directed at major violators" but noted that "we cannot guarantee that even given the increased penalties, the courts will sentence people to increased penalties."42/ During the past three years extensive investigations based on cooperation between the private and public sector have resulted in more vigorous prosecution of "major violators." The Copyright Office fully supports and encourages vigorous enforcement of the criminal infringement provisions against such major offenders.

Thank you for the opportunity to present the views of the Copyright Office. I would be pleased to respond to your questions, either now or at a later time for the record.

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41. Billboard (March 2, 1985) 27, 33.

42. The Piracy and Counterfeiting Amendments Act of 1981: Hearings on S. 691 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 9 (1981) (statement of Renee L. Szybala, Special Assistant to the Associate Attorney General, Department of Justice).

Senator MATHIAS. Thank you very much, Mr. Curran.

You indicated that in your opinion the statutory damages are a substantial deterrent to piracy.

Mr. CURRAN. Yes, sir.

Senator MATHIAS. Did you reflect on the fact that since they were established in the 1976 act, which went into effect in 1978, there has been a very serious inflation and that they are now worth 40 or 50 percent less than they were when Congress established those levels?

Mr. CURRAN. Obviously, that is true, yes, sir.

Senator MATHIAS. But your opinion still is that they are adequate?

Mr. CURRAN. It is when we view that as adequate in terms of the combinations that can exist in the law and, as we indicated, those things can add up to several million dollars in recent cases and, in that sense, we consider them adequate. Obviously, inflation is a real factor in modern life. Obviously, it has also moderated in very recent times. Whether or not those numbers should be accelerated in some fashion to account for that, we have not really examined that very carefully. It is a good point.

Senator MATHIAS. Of course, inflation has moderated, but we have not yet gotten to the deflationary stage which would reduce the cost of living back to the 1978 level.

Mr. CURRAN. I guess what I am saying is we are not aware of the concern you were expressing by the copyright owners and authors that these dollar numbers have become grievously inadequate in the recent past.

Senator MATHIAS. If we were to apply some rough cost of living measure to the maximum penalties, for example, it would go to $75,000 or $80,000 rather than $50,000.

Mr. CURRAN. I am sorry, sir. Are you asking me?

We have not attempted to analyze it in those terms, no, sir, but I would not disagree with your general observation.

Senator MATHIAS. At this point, let me yield to the distinguished Senator from Vermont, Mr. Leahy, and see if he has any questions.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Thank you, Mr. Chairman. Only a comment and I will put my statement in the record, but I am glad for this first hearing in the subcommittee dealing with remedies for copyright infringement. I think they sum up in a single issue the worldwide threat to American creativity.

One of the things we pride ourselves on as a nation is our creativity, and I think we ought to be able to protect that.

I want to compliment our chairman for having these hearings. He has shown his concern over the years, and I am pleased to be the ranking member of the subcommittee.

Senator MATHIAS. We are pleased he is the ranking member.

Senator LEAHY. I am pleased because I serve with a chairman who has shown a zeal and commitment in pursuing a sometimes complex and arcane but extremely significant agenda and some-

thing that might not have been pursued as well if it was not for your own interest.

Having said that, I will now apologize to the chairman. I just came back from Central America a few hours ago, and wearing my other hat as vice chairman of the Intelligence Committee, we are about to meet with our intelligence leaders and talk about Central America; the meeting starts now and I have to be there. Even with one Irishman, Bill Casey, there, there is still one Irishman too few, so I am going in to help fill it out.

Senator MATHIAS. The Senate has to vote on the question of aid to the Contras.

Senator LEAHY. I read that in the paper and that tended to pique my interest just a tad in what we might do and it piqued their interest in me staying in the subcommittee, but I must leave.

Senator MATHIAS. I suspect this subject will be an interesting and lively one after next Tuesday.

Senator LEAHY. If only we could copyright it.

Thank you, sir.

[The following statement was received for the record:]

PREPARED STATEMENT OF SENATOR PATRICK J. LEAHY

Mr. Chairman, I am grateful that the first hearing before this subcommittee deals with remedies for copyright infringement, because from a practical, as well as a symbolic, standpoint today's topic sums up in a single issue the worldwide threat to American creativity.

You referred in your opening statement to the electronic marvels that are now available to millions of Americans. Much of that technology originated in the United States, and the films, tapes, computer programs, video cassettes, records, and compact discs that make this equipment worth owning come largely from this country.

If we cannot assess the obstacles to the full and fair implementation of our copyright laws and then propose meaningful remedies for infringement, much of the bounty of this creativity will be lost to the men and women who enrich our culture, and much of the contribution of that creativity to the national economy will be lost as well.

It is because of these high stakes that I am so glad to be here as the ranking member of this subcommittee. And you know, Mr. Chairman, that my delight in serving with you has to do not only with the vital subject matter, but with your own zeal and commitment in pursuing our sometimes complex and arcane—but always significant—agenda.

I think that our copyright laws constitute one of the nation's unheralded treasures—which we will sorely miss if they are ever allowed to break down.

Infringement is the corrosion that can cause that breakdown, and I am dedicated, as I know you are, to punishing infringement and rewarding creativity in the manner contemplated by the Constitution.

Piracy of copyrighted material is big business both here an abroad.

With phonographs and tape recorders in most homes and VCRs not far behind, there is a brisk trade in pirated movies, records, and tapes.

This is not petty crime, but serious crime on a large scale, controlled by organized criminal elements.

In 1982 I supported legislation adopted by Congress to stiffen the criminal penalties for these violations.

But Congress only makes the laws—it doesn't enforce them. And we have many questions about how the enforcement effort is going more than two years down the road, and that's what this hearing is about.

We want to know if sufficient resources are being devoted to attacking this most serious problem of white collar crime, and if not, what must be done to strengthen the effort.

I welcome our witnesses and along with you, Mr. Chairman, greatly appreciate their help.

Senator MATHIAS. Mr. Curran, in your prepared statement, you noted that the award of attorneys' fees was only normal in a case that was deemed to be in some way punitive.

Mr. CURRAN. I ask that our counsel respond.

Ms. SCHRADER. I am not clear about the reference the Senator is making to the statement. I think we intended to indicate that attorneys' fees are within the discretion of the court, but it is quite common to award attorneys' fees to the prevailing party.

Senator MATHIAS. I am glad you clarified that because, as I read the statement, there was an implication that the conduct of the offending party had to be particularly blameworthy under normal practice.

Ms. SCHRADER. I do not think we intended to give it that tone, and if there is any confusion, we regret that. It is fairly common to have attorneys' fees.

Senator MATHIAS. I am glad you clarified that because, of course, that is not the normal practice with fee shifting in antitrust cases and other kinds of cases in which fee shifting is authorized.

Mr. CURRAN. It may be on page 7 you are referring to a quotation from the Nimmer text where we suggested some element of the moral blame might be associated with this. I think Professor Nimmer was simply noting that that may be the way the judges felt about it when they made those kinds of determinations.

Senator MATHIAS. Maybe we can whisper in the judge's ear right now and suggest that fee shifting should be readily available as in other cases.

Do you have any feeling on that?

Mr. CURRAN. No, sir. We would not disagree with it.

Senator MATHIAS. I would hope you would agree.

Mr. CURRAN. Yes, sir.

Senator MATHIAS. You also mentioned seizures, which is a form of ex parte relief in intellectual property protection.

Last year in the Trademark Counterfeiting Act, we passed legislation which authorizes ex parte seizures of counterfeit goods under certain stated circumstances. The Semi-Conductor Chip Protection Act, by contrast, expresses a preference for giving notice to defendants before hearing applications for impoundment.

The Copyright Act authorizes seizures and impoundments ex parte, but some courts have required there be some showing of an effort to notify the defendant prior to the seizure. You then have a balance between the need of plaintiffs to have swift, sure enforcement procedures before the other guy gets out of town with the goods, and the rights of the defendants to due process.

Do you think that the present state of the law strikes a balance, or do you think that it is tilted one way or another?

Mr. CURRAN. I believe that it is our view that the law, the present state of the law is generally in balance. We are not aware of problems that copyright owners have had in getting appropriate seizures, but I am not as familiar with this as counsel, and perhaps she might be better able to make an observation on that than I am.

Ms. SCHRADER. I think the Senator has aptly pointed out the dilemma. There is the concern with the protection of the fourth amendment rights against seizures of property and searches but, at the same time, the Copyright Act does have that exceptional provi-

sion where in unusual circumstances you can obtain seizure under a temporary restraining order. I think people have had concerns about the constitutionality of the procedure, but it does exist. The Copyright Office has generally believed that it is merited in exceptional cases of copyright infringement.

Senator MATHIAS. Well, that dilemma, of course, was very lively here in this room when we discussed the Trademark Counterfeiting Act, for example, because people were troubled by ex parte procedures. But under some circumstances it is really the only apparent remedy.

Ms. SCHRADER. Exactly.

Senator MATHIAS. Now, Mr. Curran, in your statement you referred to a Justice Department characterization of criminal prosecution as the last resort. I think it is only fair to note that the Department expressed the view in a different context from the one that concerns us today.

But do you think that this reflects the Department's view of criminal sanctions that are provided in the Copyright Act?

Mr. CURRAN. As we heard today, there are some interesting developments. The Justice Department is changing its view in a certain regard. As far as we are concerned, historically we view civil actions as a way the copyright owners obtained their rights, enforced their rights under the law. We recognize, however, that there are many cases, and we certainly intend to reflect the notion that many times the criminal process is the process to follow, and we do not hold the view that in any way it is the last resort. In some cases, it might even indeed be the first resort, particularly in these larger scale enterprises and operations and piracy circumstances that the criminal provisions of the law are the ones to follow. So we would not say in every case it is the last resort, not at all.

Senator MATHIAS. So the Copyright Office would not necessarily be implying that a civil remedy had to be exhausted before a criminal prosecution went forward?

Mr. CURRAN. No, sir, not at all.

Senator MATHIAS. Just a word on the software questions because that is a larger issue that will become larger yet, I think.

Your statement was that you felt it premature to increase criminal penalties for infringement of computer programs. I suppose the real issue here is whether or not the law is ambiguous as far as software piracy is concerned. Is it not?

Mr. CURRAN. Yes, sir. I mean we are just not so certain as we might be in the case of motion pictures and recorded sound issues, that the case is so clear at this time as to suggest they ought to be the same. We feel there are issues here that are not altogether clear, and we are not really prepared at this time to develop a case one way or the other, that the law is adequate on it as far as enforcement, criminal penalties associated with computer software. It is a complicated issue, and there are a lot of definitions. There are a lot of issues to raise here, and we are uncertain about that aspect of it.

Again I would ask our counsel to make an observation. She is more familiar with this than I.

Ms. SCHRADER. Responding to the Senator's point about ambiguity, at the time the amendments were passed in 1982, the law with respect to video games was very much in its early stages of development. Initially there was a dispute as to whether one could claim protection for video games as an audiovisual work. Of course, if the video game is not in any way an audiovisual work, then the normal penalties for other kinds of works would apply, including computer programs.

There is, I think, some ambiguity now because with respect to certain aspects of a video game, you can consider it as an audiovisual work. Under those circumstances, the highest penalties of $250,000 and 5 years in jail could apply, whereas to the extent that the work is basically viewed as a computer program, presumably the normal penalties—the maximum of $25,000—applies.

I can only say that this is an emerging issue. The Copyright Office still is inclined to believe, with respect to computer programs in general, that more time is needed to reflect on the scope of the exclusive rights.

The initial computer program infringement cases concerned largely verbatim copying, but there are problems of copying in homes and of less than substantial copying. At this point, one needs further time to reflect before deciding that the penalties for all infringements of software should be increased to $250,000 maximum.

Senator MATHIAS. It is always prudent to take a little time to reflect on most activities of life, particularly legislation. But it does seem to me that court law offends, since it assigns a higher degree of protection to a game than to scientific commercial intellectual property that can have a very substantial value. But, as you say, that requires a little reflection.

Mr. CURRAN. We should have observed earlier, of course, when the discussion was whether the existing amounts ought to be increased in light of passage of time and inflation, that the courts often now do not assign or award the highest damages available. That is an issue over which we do not have direct control, but the courts could be assigning within the existing law—could be making larger awards than they do.

Senator MATHIAS. Of course, one of the objectives of the law is to deter.

Mr. CURRAN. I understand and will supply an additional statement for the record on this point.

Senator MATHIAS. And the lower the penalty, I assume, the less that it is a deterrent in most cases.

We thank you very much for being with us this morning.

Mr. CURRAN. Thank you, Mr. Chairman.

Senator MATHIAS. And upon reflection we may have some further questions that we will send to you.

Mr. CURRAN. We will certainly provide that.

[The following information was subsequently received for the record:]

ADJUSTMENT OF STATUTORY DAMAGE AMOUNTS BASED ON COMPARISON OF THE CONSUMER PRICE INDEX FOR THE PERIOD 1976 TO 1985

According to the wage and price tables maintained in the Federal Reserve Board's computer system, the Consumer Price Index for January 1985 (the most recent data available) was 316.6; for all of 1976 it was 170.5. (Each of these index numbers is based upon a value of 100 assigned to the year 1967.) This means that the CPI for January 1985 (the most widely used measure of the price level of the economy as a whole) was 1.857 times larger than the CPI for 1976.

The four dollar amounts specified in the statutory damages provisions of the law are $250-10,000, 50,000, and 100; the first two are the standard range within which the courts have discretion, the third is the increased maximum in the case of willful infringements, and the last is the partially reduced minimum applicable to certain innocent infringers.

A precise adjustment from 1976, when these amounts were declared by Congress to be appropriate, to 1985 yields a standard range of $463-18,500, with an enhanced maximum of 92,850 and a reduced minimum of $185.

A more plausible proposal might be simply to double all values: this would create a standard range of $500-20,000 with an enhanced maximum of 100,000 and a reduced minimum of 200.

There is a stronger argument for adjusting statutory damages for inflation than for adjusting criminal penalties, since the former are designed not to punish defendants but to make plaintiffs whole in cases where actual damages are difficult or impossible to prove. In all civil cases, including copyright cases, actual damages are awarded by juries in accordance with perceived price levels at the time the verdict is awarded. If statutory damages are left unchanged while the price level almost doubles, then their utility in making injured copyright owners whole must necessarily be diminished.

Senator MATHIAS. Next we have Mr. Michael Kirk, Assistant Commissioner of External Affairs of the Patent and Trademark Office.

Mr. Kirk, it is a pleasure to welcome you again to the committee.

STATEMENT OF MICHAEL K. KIRK, ASSISTANT COMMISSIONER FOR EXTERNAL AFFAIRS, U.S. PATENT AND TRADEMARK OFFICE, DEPARTMENT OF COMMERCE

Mr. KIRK. Thank you, Mr. Chairman, for the opportunity to appear here today to express the views of the Patent and Trademark Office on this important area.

The unauthorized duplication of American works of authorship is a worldwide problem. Bogus copies of American video and audio tapes can be found in street markets throughout the Third World. Unauthorized copies of American computer software flood the markets in many of the so-called newly industrialized countries. Some of these countries have become major sources of unauthorized translations and copies of U.S.-produced educational materials. This hurts not only American authors, but, by driving locally produced works off the market, it does critical damage to the growth of authorship in those countries where such practices are common.

As this subcommittee is aware, copyright is recognized internationally by two principal conventions: the Universal Copyright Convention and the Berne Convention. The United States belongs to the UCC but not Berne. Thus, the UCC is the principal source for protection of U.S. works of authorship in the 77 other member states of the UCC. I should also mention, however, that the administration is currently reviewing the desirability of adhering to the Berne Convention.

In addition to our emphasis on the Copyright Conventions, we believe that intellectual property must be a topic dealt with in bilat-

eral discussions. Government-to-government discussions dealing with trade and investment have proven to be especially effective. The Department of Commerce is working closely with the Department of State, the Office of the U.S. Trade Representative, and the Copyright Office to assure that intellectual property issues are considered in trade discussions.

Based on initiatives in Taiwan and South Korea and earlier successful bilateral negotiations in Eastern Europe, the Department of Commerce has established a goal and a program for strengthening intellectual property protection worldwide. Working with representatives of the motion picture, recording, publishing, and computer industries, among others, we developed detailed instructions for the Commerce Department's Foreign Commercial Service Officers to report to Washington on the state of protection of intellectual property in the countries in which they are stationed. Based on these reports and our contacts with industry, we are developing papers analyzing and evaluating intellectual property protection in nine target countries. After we have refined these papers, we will use them as the basis of bilateral discussions in the countries involved.

We will also share them with the U.S. Trade Representatives for its use in carrying out its responsibilities under the Trade and Tariff Act of 1984.

Training programs for the administration of patent, trademark, and copyright systems will begin in July here in Washington under this program. Another aspect of this program involves educational seminars. Earlier this year, we conducted the first of these in Thailand, Malaysia, and Indonesia. In those seminars, which were attended by attorneys, government officials, educators, and businessmen from the countries involved, U.S. experts from government and the private sector presented lectures on current important issues in international copyright law, including the need to provide for adequate remedies and enforcement mechanisms to deter infringement. The message of the seminars was clear. To participate in modern world trade and to encourage investment in local markets, sound protection for intellectual property is essential.

To encourage effective enforcement of copyrights worldwide, there are a number of actions which the United States should undertake. The executive branch must continue its coordinated efforts to make other nations aware of the depth of the United States concern regarding adequate and effective protection of American intellectual property. The U.S. private sector should continue to participate in educational efforts to encourage respect for intellectual property rights.

The U.S. Government can, and should, undertake efforts in this country to prevent unauthorized in-house copying of copyrighted materials by its employees. The Trade and Tariff Act of 1984, which linked eligibility for generalized system of preferences benefits to adequate and effective protection for U.S. intellectual property, should be monitored closely to determine if further legislative action is needed.

One other area that might be explored involves statutory provisions dealing with remedies and sanctions for copyright infringe-

ment. This has already been touched upon here this morning in the context of possibly considering raising some of the sanctions.

In summary, Mr. Chairman, we have traveled around the world advocating to other nations that they establish sanctions of such magnitude to make it economically unprofitable to engage in the infringement and piracy of intellectual property. If we are to have credibility, we must do the same in this country.

I thank you for this opportunity and will be happy to answer any questions you may have.

[The following statement was received for the record:]

PREPARED STATEMENT OF MICHAEL K. KIRK

SUMMARY

The unauthorized duplication of American works of authorship is a worldwide problem. To encourage effective enforcement of copyrights, there are a number of actions that the United States should undertake. The Government must continue its efforts to promote worldwide the adequate and effective protection of intellectual property through educational efforts, bilateral trade and investment talks, participation in the multilateral fora of the international copyright conventions, and cooperation with private sector copyright owners and users. The effects of the intellectual property provisions of the Trade and Tariff Act of 1984 should be monitored to determine if further legislative change is needed. We should also be prepared to reexamine the civil and criminal sanctions of the copyright law to ensure they continue to offer effective deterrence.

* * *

Mr. Chairman and Members of the Subcommittee:

I welcome this opportunity to appear before your Subcommittee today and to share with you some of the information we have gathered through participation in the Working Group on Intellectual Property of the Cabinet Council on Commerce and Trade and through our involvement in international discussions covering the full range of intellectual property law. At this point, I should mention that, on April 11, 1985, President Reagan announced the creation of a new Economic Policy Council that subsumes the functions of the Cabinet Council on Commerce and Trade. Like the cabinet councils, the Economic Policy Council will rely heavily on interagency subcabinet level Working groups. Today, I would like to discuss copyright enforcement from this international perspective by pointing out some of the problems that American authors and copyright owners face abroad and by discussing what can be done to aid in the enforcement of their rights.

Background

The unauthorized duplication of American works of authorship is a worldwide problem. Bogus copies of American video and audio cassette tapes can be found in street markets throughout the Third World. Unauthorized copies of American computer software flood the market in many of the newly-industrialized countries. Some of these countries have become major sources of unauthorized translations and copies of U.S.-produced educational materials for other countries that share their language. This hurts not only American authors but, by driving locally produced works off the market, it does critical damage to the growth of authorship in those countries where such practices are common.

This tremendous increase in the level of unauthorized duplication is directly traceable to advances in technology and to increasing standards of living and income levels in many countries throughout the world. Only a few years ago, because of the high equipment costs, duplication of copyrighted works was a phenomenon largely confined to the developed world. But the increased availability of high-quality, low-priced equipment capable of cheaply and rapidly duplicating copyrighted works has caused uncontrolled duplication to spread throughout the world. Modern videocassette recorders can record motion pictures, television programs, or other copyrighted works for later viewing, or more importantly, for copying and further distribution. Tape-to-tape cassette recorders and special high-speed versions of the same equipment make it easy to copy sound recordings. In spite of sophisticated hardware and software safeguards against copying, software diskettes and tapes for personal computers can be copied by any relatively sophisticated user.

International Copyright

The products that are among the most often duplicated are those protected by the copyright laws of the various nations around the world. Internationally, copyright is recognized by two principal Conventions: the Universal Copyright Convention (UCC) and the Berne Convention for the Protection of Literary and Artistic Works (Berne). The United States belongs to the former but not the latter. Thus, the UCC is the principal source for protection of U.S. works of authorship in the 77 other States that adhere to the Convention.

In a technical sense, there is no such thing as an international

copyright. Rather, the more correct statement is that there is an international system that provides that works originating in one country receive protection in a second country under the second country's laws. Simply put, this means that a work created by an American author and published in the United States will be protected, for example, in Australia under the copyright law of Australia in the same way that the work of an Australian author would be. This principle of national treatment is the cornerstone of the international copyright system supported by the strong foundation of the minimum author's rights provided by the Conventions.

If the sole requirement arising from an international copyright convention was a requirement to give national treatment, meaningful levels of protection would be illusory. To take the worst example, a country having no copyright law could adhere to the convention and claim that works of its citizens should have full protection in other member countries and give works originating in those countries no protection at all. Since that would be the same as it gave its own citizens, the principle of national treatment would be satisfied.

Fortunately that is not the case, since both the Berne and the Universal Conventions specify minimum levels of protection that must be afforded to the works of authors and other copyright owners. Berne sets out slightly more detailed standards than the UCC, but neither Convention specifically deals with the problem that is before us today. While the Conventions specify what rights are to be protected, the matter of how those rights are to be enforced is left to national legislation.

International Copyright Enforcement

There are 76 countries that adhere to the Berne Convention, 78 countries that adhere to the Universal Copyright Convention, and 51 that adhere to both. In each of those countries, the enforcement mechanisms vary, but some common threads run through all of the national laws. Copyright, like other intellectual property laws, deals principally with the establishment of private rights at civil law. Criminal sanctions are secondary in most copyright systems. For example, our own copyright law provides that a party whose work is infringed may seek a preliminary injunction, a permanent injunction to prevent infringement, actual or statutory damages, the infringer's profits, and in many cases, costs and attorney's fees. The law also provides for criminal

sanctions ranging from $250,000 and five years imprisonment for the reproduction or distribution in any 180-day period of at least 1,000 phonorecords or at least 65 motion pictures or other audio-visual work, to not more than $25,000 and one-year imprisonment in other cases. Also, infringing copies of phonorecords and all articles or devices used in their production are subject to seizure and forfeiture or other disposition.

To take another example, the copyright law of Thailand -- a country with which the United States has only bilateral copyright relations -- provides for a different set of remedies. Thai law provides for a series of fines ranging from approximately $U.S. 200 with no imprisonment to $U.S. 8,000 with one-year imprisonment. The copyright owner receives one-half of the fine and the law further provides that the penalties shall be doubled in the case of repeat offenses within five years. The copyright owner may also bring a civil suit for damages in excess of the share of the fine received.

Other laws vary accordingly. In Taiwan for example, the laws provide for fines for violations that are so small, even in the context of income levels in those countries, that infringers can simply regard them as costs of doing business. In other countries such as Malaysia or Nigeria, even though the laws provide for fines or other sanctions at levels that would be a deterrent, local courts often impose minimal fines or sentences, seldom imposing the maximum. In some countries, such as Korea and Indonesia, American authors are not protected because the country neither belongs to an international copyright convention nor has bilateral copyright relations with the United States. And in some countries, like the Philippines, resorting to the local judicial system is simply ineffective. Also, countries do not completely agree on how to deal with new technological uses of copyrighted works or how to protect new kinds of authorship. For example, Japan has only recently joined the international consensus that computer programs are protected by copyright. In short, the international aspects of copyright enforcement are complex and deserve continuing attention. The Administration is continuing to address these problems both in the international copyright fora, and in the implementation of the President's responsibilities under the Trade and Tariff Act of 1984. But one thing is clear: There is neither a quick fix nor an immediate solution to these problems.

A wide range of options need to be considered in developing a

comprehensive solution to assure that users have the access to copyrighted works that they need, and that the rights of authors and copyright owners will be adequately protected. The implementation of a solution will require close cooperation among copyright proprietors, users, and the Government. Within the Government, it will require the continued cooperation of the Department of Commerce, the Department of State, the Office of the United States Trade Representative, and the Library of Congress' Copyright Office, and it will also require the continued, sympathetic support that intellectual property has had in the Congress.

One of the principal components of the program must be education, both at the domestic and international levels. Until recently, copyright was a rather esoteric body of law of interest to only a few specialized lawyers and to the copyright-intensive motion picture and publishing industries. The level of knowledge about copyright in the general public remains low in spite of the expansion of duplicating technology into all phases of modern life. Educational efforts to increase public awareness about the copyright law and the consequences of copying will help control the problem.

In addition to the United States' major focus on the multilateral copyright conventions, intellectual property should continue to be a topic dealt with in bilateral discussions. Those discussions dealing with trade and investment can be especially effective as additional fora. This applies to dealings with developed nations as well as newly industrialized and other developing nations. Some current examples include the recent Japanese decision to recognize copyright protection for computer software, a topic that had been raised at the highest levels in U.S.-Japan bilateral discussions; the issue of cable retransmission of broadcast programming which continues to be a topic of U.S.-Canadian bilateral discussions; and, questions regarding the unauthorized interception and retransmission of satellite-transmitted motion pictures and other programming which continues to be a problem in the Caribbean Basin. As I noted, the United States has convinced Japan that copyright is the proper form of legal protection for software. The Canadian Government has indicated a willingness to consider the copyright status of cable retransmission in Canada. Also, the Caribbean Basin Initiative legislation has helped bring the Jamaican broadcasting authorities to the negotiating table.

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The international copyright system provides a forum in which many of these problems can be addressed. Despite the United States' withdrawal from the United Nations Educational, Scientific and Cultural Organization (UNESCO) at the end of 1984, the United States retains its seat on the Intergovernmental Copyright Committee (IGCC), the governing body for the administration of the Universal Copyright Convention. The IGCC and the Executive Committee of the Berne Convention, administered by the World Intellectual Property Organization, meet jointly to address copyright problems. Those committees also convene meetings of experts to take up, in detail, many of the copyright issues of concern in the enforcement area. With respect to countries that are members of the Conventions, this provides an excellent forum where mutually acceptable solutions to problems can be worked out. Our continued and even strengthened participation in this international forum is essential. As we have done since we joined the Universal Copyright Convention, we should also continue to urge other countries to join both of the international conventions.

International organizations, such as the World Intellectual Property Organization, sponsor training courses for intellectual property officials from developing and newly-industrialized countries. We must continue to encourage these efforts and cooperate in them.

A final point in discussing the options available is that all members of the copyright community -- authors, copyright owners, users, and the Government -- must work together to support mutually agreeable goals. Authors, copyright owners, and users must recognize that neither owners' nor users' rights are absolute; they are always tempered by considerations of fair use and other statutory limitations. Users must realize that untrammeled duplication of copyrighted works, in the long run, will only harm their interests by forcing proprietors to withdraw products from the market or to choose alternative and more restrictive systems of distribution for their products. Owners must also recognize that overly restrictive systems will only encourage the copying they seek to control.

Government Actions

The Department of Commerce's Patent and Trademark Office and International Trade Administration have been working closely with the Department of State, Office of the United States Trade

Representative (USTR), and the Copyright Office to assure that intellectual property issues involving copyright are considered in trade discussions, as well as in meetings solely concerning intellectual property matters. This cooperative approach has been highly successful. For example, representatives of State, Commerce, USTR and the Copyright Office have held working-level meetings with the Taiwanese to discuss progress on their copyright revision efforts and to adivse them of developments concerning implementation of the intellectual property features of the Trade and Tariff Act of 1984. The delegation also discussed with South Korean officials certain issues of mutual concern over the proposed revision of the South Korean copyright law. As a result of these talks, Korea is rewriting its proposed legislation to take into considertion the views expressed.

Based on these initiatives and earlier successful bilateral discussions, the Department of Commerce has established a goal of strengthening intellectual property protection worldwide. Working with representatives of the motion picture, roording, publishing, and computer industries among others, we developed detailed reporting instructions for the Commerce Department's Foreign Commercial Service Officers. Based on their reports, and our contacts with industry, we are developing papers analyzing and evaluating intellectual property protection in nine target countries. They are Brazil, Mexico, South Korea, India, Indonesia, the Philippines, Thailand, Malaysia and Singapore. After we have refined these papers, we will use them as the basis for bilateral discussions with the countries involved. We will also share them with the Office of the United States Trade Representative for its use in carrying out its responsibilities under the Trade and Tariff Act of 1984. Training programs for the administration of patent, trademark, and copyright systems will begin in July here in Washington.

Another aspect of the Department's efforts involve educational seminars. The first were conducted in Thailand, Malaysia, and Indonesia. In those seminars, which were attended by local attorneys, government officials, educators, and businessmen, U.S. experts from Government and the private sector presented lectures on crucial issues in international copyright law, including the need to provide for adequate remedies and enforcement mechanisms to deter infringement. Local experts also participated in those meetings. The message of the seminars was clear: to participate in modern world trade, intellectual property must be adequately protected; and, to encourage foreign investment in local markets, sound protection for intellectual property is essential.

In Malaysia, the seminars appear to have been particularly successful. At the close of the meeting, the local participants organized a committee to consolidate views on supporting revision of Malaysia's copyright laws to provide better protection for foreign works, to deal with problems of audio and video piracy, and to consider copyright protection for software. Reports of the seminar in the Malaysian press were highly favorable and should help to encourage favorable action on improvements in the Malaysian copyright law. Speaking at the seminar, the Deputy Minister of Trade and Industry, Muhyuddin Yassin, stated that Malaysian copyright owners had been overly dependent on the Government for the protection of their rights and that "[t]here is a need for copyright owners to organize themselvs into associations which are capable of monitoring the reproduction of works of its members and collecting what is due to them." He added that these "organizations would be of tremendous assistance in the government's and copyright owners' efforts to combat piracy."

Of course, these seminars must be followed by continued educational efforts for local officials regarding copyright and other forms of intellectual property. This can be done through continued government-to-government discussions, and it can be supplemented by private sector contacts with counterpart organizations in the foreign country. International organizations such as the International Federation of Phonogram and Videogram Industries (IFPI), and the Motion Picture Export Association (MPEA) can be particularly helpful.

Recommendations

To help assure effective enforcement of copyrights worldwide, the United States now can take a number of actions and keep in mind others for further consideration if developments warrant.

The Executive Branch must continue its joint efforts to make other nations aware of the depth of the United States' concern regarding adequate and effective protection of American intellectual property. The Departments of State and Commerce, the Office of the United States Trade Representative, and the Library of Congress' Copyright Office must continue their close cooperation in educational efforts.

The private sector must be encouraged to participate in educational efforts to encourage respect for intellectual property rights. Many private corporations are currently conducting in-house campaigns to inform employees about the need to respect

copyright by observing policies aimed at controlling photocopying, duplication of educational materials, and copying of computer software. Organizations such as the Association of Data Processing Service Organizations (ADAPSO) have embarked on educational efforts designed to inform computer users about the nature of copyright protection for software and individual responsibilities to combat software piracy.

The Government can and should undertake similar efforts to control in-house copying. For example, a recent memorandum informed all Department of Commerce employees about the need to observe software copyright and avoid unauthorized duplication of software.

Last October Congress passed legislation that links protection of U.S. intellectual property to eligibility for the Generalized System of Preferences (GSP) benefits. The Trade and Tariff Act of 1984 requires the President to consider whether a foreign nation provides adequate and effective protection for U.S. intellectual property as one of the factors in determining a country's eligibility for GSP benefits including duty-free entry of their imports. Section 301 of the Trade Act of 1974 has also been amended to authorize the President to take action against unreasonable and unjustifiable practices of foreign countries, including those related to intellectual property, if those practices burden U.S. commerce. Section 301 was also changed to permit the USTR to self-initiate investigations into such burdensome practices. The USTR has established an interagency committee to review foreign treatment of U.S. intellectual property in these areas. It is too soon to evaluate the effects of this legislation but it should be monitored to determine if further legislative change is needed.

Areas that might be explored are the statutory provisions dealing with copyright violations. The present limits on damages in the copyright law were set in 1976 and they have not been adjusted since then. If we wish to encourage foreign countries to establish meaningful measures of liability in their laws, we must be prepared to reassess the adequacy of our own provisions on a regular basis. Similarly, periodic reexamination of the adequacy of criminal sanctions may also be appropriate -- that is, the extent, if any, to which works other than motion pictures and sound recordings ought to be subject to increased criminal penalties.

I thank you for this opportunity to testify and will be happy to respond to any questions you may have.

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Senator MATHIAS. Thank you, Mr. Kirk.

You mentioned a training program for American commercial officers around the world. These, of course, are representatives who are in diplomatic positions at international organizations; is that right?

Mr. KIRK. No, Mr. Chairman. Our training program involves locating developing country nationals who have responsible positions in their respective intellectual property systems and bringing them to Washington. We will train them in the Patent and Trademark Office and in the Copyright Office, as well as taking advantage of the International Trade Commission and other resources we have here in Washington, and demonstrate how an effective protection system might be established for the intellectual property area they may be concerned with.

Senator MATHIAS. How many people are involved in this?

Mr. KIRK. We will begin our first program in July. We unfortunately only have funding for six. We had a rather large response. More than 40 countries indicated a very strong interest in sending people to this program.

Senator MATHIAS. Only six trainees?

Mr. KIRK. Yes, Mr. Chairman

Senator MATHIAS. I think that clearly ought to be expanded. I was going to say it was clearly inadequate, but I was groping for a more positive response. [Laughter].

Mr. KIRK. I certainly would agree with you, Mr. Chairman, and we will, next fiscal year, return to this and hope that we can enlarge this training program.

I might add that, for example, Japan trains in a similar fashion more than 50 developing country nationals each year. This is the first time that the United States has engaged in this and, unfortunately, we have to begin with only six.

Senator MATHIAS. Is the expanded program reflected in the Department's budget request?

Mr. KIRK. It is not, Mr. Chairman, nor is this program.

Senator MATHIAS. In other words, it can go forward on departmental funding without a line item on it?

Mr. KIRK. That is correct, Mr. Chairman.

Senator MATHIAS. You do anticipate that it will go up to about 50 during the coming year?

Mr. KIRK. I would not anticipate it would go that large, no, Mr. Chairman. We had initially targeted 15 to 20 for the first class, but due to the 1985 Deficit Reduction Program that cut back on our travel funds, we had to scale our program back substantially. I cannot say, at this point, how large our program for fiscal year 1986 will be, but hopefully larger than six.

Senator MATHIAS. What can we do to encourage you to expand a little more rapidly? Send cash? [Laughter.]

Mr. KIRK. Yes, Mr. Chairman.

Senator MATHIAS. It does seem to me it is a critically important area, because if we are to recover the enormous economic losses to the American economy from piracy, we have got to begin where the pirates are, which in many cases is out in the developing world. If those governments are evidencing any interest at all in applying intellectual property protection, which would seem to be the case if

you had 40 responses, 40 national responses, then we ought not to discourage it while they are in that mood. We ought to encourage the effort, discourage the piracy while they are in that mood.

Mr. KIRK. We agree totally.

Senator MATHIAS. What kind of private sector involvement is there in this program?

Mr. KIRK. In the training program here in Washington, we have not finalized a schedule. I would anticipate that it is going to be primarily governmentally operated as far as expressing to these people how they might run a Patent and Trademark Office or a Copyright Office. The educational seminars that I mentioned did involve private sector participation. Moreover, private sector participants have gone with us in our bilateral discussions to Taiwan, Singapore, South Korea, and other countries. So I think there is not only a very helpful, but an absolutely necessary, private sector participation in this endeavor.

Senator MATHIAS. If there is anything this committee can do to encourage you in this, we would want to do it. It seems to be an essential effort in gaining worldwide recognition of the importance of intellectual property, indeed of the existence of the intellectual property, in some parts of the world.

Now, you noted the Japanese change in policy with respect to copyright protection for computer programs. What is the status of the international recognition of copyright protection in computer programming?

Mr. KIRK. I think, Mr. Chairman, that the status is a growing trend or consensus toward recognizing the copyrightability of computer software. We believe that the efforts by the Congress in terms of Senator Lautenberg's resolution that found its way into the Trade and Tariff Act of 1984 and statements by various Members of the Congress, coupled with continuing administration efforts in Japan and elsewhere around the globe, really resulted in Japan deciding that it would find its future better served by going the copyright route for protecting computer software. We think the Japanese decision should have some very positive benefits in other ASEAN countries. South Korea and others are looking to the Japanese for a signal for their future copyright law provisions, so it should be very helpful in that respect.

Furthermore, it does isolate those countries, for example, Brazil, which still appear to insist on a sui generis system for protecting software outside of copyright. It should serve to isolate Brazil and perhaps help us convince them too that their future is in copyright protection for software.

Senator MATHIAS. You mentioned the Trade Act, in which there was an attempt to tie benefits and preferences to the creation of meaningful protection for intellectual property.

Does your department monitor that particular provision of the Trade Act?

Mr. KIRK. No, sir; we do not. We participate with the Office of the U.S. Trade Representative in this respect. The U.S. Trade Representative has a Trade Policy Committee structure under which they have established an interagency committee to consider how to implement and carry out the provisions of the Trade Act. They have published a notice in the Federal Register requesting informa-

tion on intellectual property practices of foreign nations that might constitute trade barriers, and we will be working with them to help them pull together the necessary information they will need to implement this.

Senator MATHIAS. It will then be the Trade Representative who will make that determination?

Mr. KIRK. That is correct.

The President, Mr. Chairman, has the ultimate decision. The recommendations to the President for his decision will come from the Trade Representative.

Senator MATHIAS. Has there been any visible sign of change, say, in the Far East, as a result of the enactment of these provisions, anything you have observed?

Mr. KIRK. Yes and no, Mr Chairman. If I may explain, we have been talking with the Taiwanese officials now for almost 3 years. Our progress has been extremely slow and sometimes very frustrating. In the areas of unfair competition and patent protection for chemical compounds, we had proposed a year ago that we have small working group discussions to discuss possible improvements in the Taiwanese law in both of these areas. We were quite frankly being stonewalled by the authorities there until it was explained to them very clearly that they would either begin talking with us about these issues or U.S. Trade Representative would recommend that the President consider self-initiating a 301 action under the Trade Act. When it was explained to them in this fashion, they agreed very quickly to talk with us, and we will meet with them next month on these two issues in Taipei.

So I think in that sense it may, down the road, have some effect, but I think it is too early to make any judgments.

Senator MATHIAS. Another aspect of the working group's activity was the Berne Convention.

How close are you to making some kind of recommendation to the President on that subject?

Mr. KIRK. I think, Mr. Chairman, that this will be a matter that should be resolved within the next couple of weeks.

Senator MATHIAS. By July 4?

Mr. KIRK. That would be a nice time. No, sir; I think we will beat that.

Senator MATHIAS. You think it will be before that?

Mr. KIRK. Yes.

Senator MATHIAS. Has the working group considered the fact that of the major industrial nations only the United States and the Soviet Union are not parties to the Berne Convention?

Mr. KIRK. Yes, sir; we are painfully aware of that.

Senator MATHIAS. Why painfully, if I can draw you out a little bit on that?

Mr. KIRK. There are individuals involved in the process, and I would have to include myself as one of those, who feel that there are many benefits for the United States in adhering to the Berne Convention. If I may cite my experience in dealing with other nations in trying to encourage them to improve their intellectual property protection—for example, you mentioned the Trademark Counterfeiting Act. In talking with countries about the fact that a great amount of counterfeit goods come from a given country, they

would turn to us and say, "Well, what do your laws provide in the way of criminal sanctions?" The answer would be, "Well, we are considering it." The answer now is that we have a very effective law on the books and we will see how that is working. We heard this morning there were some guilty pleas in Chicago, which I was pleased to learn.

I think the same is true in the copyright world. If we are going to advocate to other countries around the globe that they should provide stronger protection for copyright, I think we would be in a much better position to make that argument if we were a member of the stronger and more detailed of the two conventions that exist. That is a personal view.

Senator MATHIAS. Unesco is the international agency that administers the Universal Copyright Convention.

What is your assessment of the effect of the U.S. withdrawal from Unesco on protection of American authors' rights in overseas publications of their works?

Mr. KIRK. It will, in one sense, have no effect since our membership in the Universal Copyright Convention stands on its own and we can still participate in the Intergovernmental Copyright Committee, which is the governing body of the Universal Copyright Convention.

On the other hand, there will be an adverse effect because we will not be able to participate in the general assembly of Unesco which determines the program and budget for the copyright activities of Unesco. We will not have a voice at that time of year when the programs established by Unesco are out forward and amounts of money are associated with them. So we will lose our voice in that forum.

Senator MATHIAS. So there is some degradation of protection as long as we are not a member of Unesco?

Mr. KIRK. Yes, Mr. Chairman.

Senator MATHIAS. What about the availability of foreign courts for U.S. copyright proprietors? Have you any observation to make on how easy it is for Americans or those holding U.S. copyrights to get enforcement of their rights in foreign courts?

Mr. KIRK. Mr. Chairman, it varies from country to country. Obviously, I am not familiar with all of the countries. I am familiar with the few that we have visited. I do know that it is a serious problem not only in terms of having access to the courts to enforce one's rights but also in all of the other associated aspects of enforcement; that is, the lack of adequate discovery mechanisms, the lack of standards of evidence to determine when one has proven one's case, the lack of trained judiciary There are a number of problems around the world associated with copyright proprietors having access to a judicial system. This is part of the program that the Department has established to deal with those that we regard as the most offensive, to try to improve the situation on a country-by-country basis.

Senator MATHIAS. We thank you very much, Mr. Kirk, for being with us today and for your observations.

Mr. KIRK. Thank you.

Senator MATHIAS. We may have some further questions which we will submit in writing.

Our next witness comes to the subcommittee for his first post-graduate testimony before this committee. Mr. David Ladd, former Register, we welcome you to the subcommittee.

STATEMENT OF DAVID LADD, FORMER REGISTER OF COPYRIGHTS, WILEY & REIN, WASHINGTON, DC

Mr. LADD. My statement will be very brief.

First, when the criminal penalties for copyright infringement were increased in 1982, one of the reasons that was advanced for that step was to make the candle worthy of the game in the hands of prosecuting authorities—in other words, to make the penalties high enough to give the prosecuting authorities an incentive to bring actions. Congress did take that step. Whatever the agenda of priorities of the Department of Justice is, the prosecution of criminal violations of the Copyright Act should not decrease after that legislation was adopted.

Second, most of the recent colloquy between Mr. Kirk and you, Mr. Chairman, has dealt with international matters, and I would make the observation that several months ago the Copyright Office filed a report on piracy in international markets and drew as one of its conclusions from that study that in adopting changes to our copyright law in the future, because of the impact is so important in international markets that as much attention is going to have to be given to what effect legislative change has upon our international copyright relations and upon our international treaty obligations as upon the domestic market itself and the rights of copyright holders within the United States. By the same token, just as I think that in order to advocate high and excellent standards of copyright protection abroad, the United States will have to maintain model or paradigm standards in its own domestic legislation.

As I say, by the same token, our enforcement of our laws, including the criminal enforcement here at home, is going to have to be a paradigm as well.

I led the delegation to Taiwan a year ago this month for discussion of copyright matters. It became clear in the discussions that there was a problem not only in encouraging the Taiwan authorities to adopt adequate effective copyright laws, but also to communicate to the judicial and administrative infrastructure of the Taiwan Government the necessity of effectively enforcing those laws. So my point is a simple one, that both in the enforcement as well as in the formal substantive formulation of our copyright laws we have to set an example.

One final comment which really does not belong in this testimony, but departs from the discussion a moment ago about what is being done to secure adequate and effective protection of American copyright properties abroad, and whether or not there has been any indication that the efforts that the U.S. Government and its private sector have made are having any effect, there is now an important opportunity to advance that cause.

Beginning in 1980, the Copyright Office, with full support and avid interest on the part of the copyright industries in the United States, conducted a series of discussions, training programs and the like with the Chinese Government. The purpose of that exchange

has been to encourage the People's Republic to adopt at the earliest possible time an adequate copyright law in fulfillment of their treaty obligations with us.

Senator MATHIAS. This was not an enforcement program?

Mr. LADD. This is not an enforcement point at all.

Senator MATHIAS. Such as the one Mr. Kirk was describing?

Mr. LADD. No; this relates solely to the encouragement of the development of adequate legislation in foreign countries.

Senator MATHIAS. Policy?

Mr. LADD. Yes; and I promise I will not get off on a long statement.

To make a long story short, the Chinese have made it known for several months now they wish to send a training delegation to the United States for training in the Copyright Office. Funds have been raised from the private sector upon the solicitation of the Copyright Office for this purpose. The project, I think, has unfortunately been delayed. Substantial moneys are at hand, and my point is that we are putting at risk years of activity and cultivation with some success by delaying this.

The Library of Congress directed me to stop planning this in about October or November of next year until my successor was appointed. The Chinese wanted to come in April. They still want to come, and expressed that when I met with them in China in November.

So my only point is that I think that that effort represents such an important opportunity for the United States in now such favorable circumstances that I would invite the committee to look into the status of those plans, and if it finds the encouragement of the completion of that project, to express its opinion.

Thank you, Mr. Chairman.

[The following statement was received for the record:]

PREPARED STATEMENT OF DAVID LADD

SUMMARY

Copyright piracy is a pervasive problem and will continue to be because the profits from piracy are so large. Civil penalties are inadequate to control commercial piracy. Criminal penalties, and enforcement of them, are necessary.

Congress has recently increased criminal penalties, in part to encourage prosecution of offenders. At a minimum the vigor of their enforcement should not decrease.

Diligent enforcement of criminal penalties for copyright enforcement is important not only to contain piracy within the United States, but also to set an example for other countries, especially those in which piracy is prevalent and American rights holders, authors, composers and performers and the United States itself are thereby injured.

* * *

Mr. Chairman and Members of the Subcommittee,

This hearing is intended to examine whether the remedies for copyright infringement contained in Titles 17 and 18 of the United States Code are adequate. My comments will be confined to the criminal penalties and their enforcement.

Piracy of copyrighted works, especially of audiovisual works and sound recordings, has been a serious problem for a long time. New technologies facilitate fast and cheap copying of all kinds, authorized and unauthorized. And the temptation to piracy is enormous. All kinds of copyrighted works are pirated, but within the United States piracy of motion pictures and of records has been especially troublesome. Producing records and films costs vast sums of money, and risk is the essence of those industries -- risk in finding, sponsoring, and presenting not only new works, but new artists. The sensational successes grab our attention; but the failures -- necessary to find the successes which

unpredictable public taste rewards -- sink unnoticed from sight, leaving record and film makers with losses instead of profits.

The pirate takes none of this risk. He shuns the failures, takes only the winners; and his costs do not include paying the authors and composers, or even selecting them in the first instance, or advertising and promoting the records or films. Rather the pirate's costs are confined to those of mere physical copying and releasing his piratical copies into sales channels. He almost never has losses.

The result is that the authors, composers, publishers, and performers are denied their legal and just reward, and the incentive of copyright is compromised.

The Piracy and Counterfeiting Amendments of 1982

As recently as 1982, Congress increased the criminal penalties for infringement of motion pictures and sound recordings.[1/] In hearings on that legislation, the Senate Committee on the Judiciary heard and accepted evidence that "[p]iracy and counterfeiting of audiovisual products have grown rapidly in recent years, developing into a highly sophisticated, billion-dollar-a-year business."[2/] In the same report the Committee noted the statement in the 1980 Report of the Attorney General entitled "National Priorities for the Investigation and Prosectuion of White Collar Crime" that

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1 Piracy and Counterfeiting Amendments Act of 1982, Public Law 97-180, 96 Stat. 97 (May 24, 1982).

2 The Piracy and Counterfeiting Amendments Act of 1981, Committee on the Judiciary, U.S. Senate, Report 97-274, 97th Cong., 1st Sess., p. 3.

> Piracy and counterfeiting of copyrighted material, the theft of intellectual property, is now a major white collar crime. The dramatic growth of this problem has been encouraged by the huge profits to be made, while the relatively lenient penalties provided by the current law have done little to stem the tide.3/

Moreover, the Committee also observed the further statement in the 1980 Attorney General's Report that "'[t]here is evidence that organized crime is becoming increasingly involved as a major supplier of counterfeit products.'"4/ And the Committee concluded that

> Fighting the involvement of organized crime in this area of criminal activity requires, at a minimum, stiffer punishment upon conviction of piracy and counterfeiting.5/

Accordingly, Congress provided for "stiffer punishment" by enacting The Piracy and Counterfeiting Amendments Act of 1982.

The need for criminal penalties is clear. Civil penalties can sometimes be absorbed as a mere cost of doing business. However large, civil penalties at most result in the collapse of an illegal enterprise. Only criminal penalties, with jail or the prospect of jail, are drastic enough to restrain repeated offenders and to deter the flagrant kinds of piracy with which the Congress has been concerned.

The laws must, of course, be enforced. And they have been -- by the Government with the assistance of the copyright owners themselves. But piracy is so profitable that relentless enforcement is necessary to control it.

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3 Id., p. 4.

4 Id., pp. 5-6.

5 Id., p. 6.

I am not in a position to assess the competing demands on the Department of Justice and district attorneys throughout the United States, and thus to recommend where in their priorities prosecution of piracy should rank. But one reason advanced for increasing penalties in 1982 was to make the penalties stiff enough to encourage prosecutors to pursue piracy more diligently. Congress has done that; and it would seem that at a minimum the vigor of enforcement should not decrease.

The Record Rental Amendment of 1984

Last year the Congress passed the Record Rental Amendment of 1984.[6/] Congress thereby amended the first-sale provision[7/] of the Copyright Act to enable owners of sound recordings, and the musical works embodied in them, to control the subsequent rental of previously sold phonorecords. Section 109(b)(3) of the Copyright Act as amended specifically provides that anyone who distributes a phonorecord in violation of this provision "shall not be a criminal offense under section 506 or cause such person to be subject to the criminal penalties set forth in section 2319 of title 18."

The explanation given in the Report of the House Judiciary Committee for the decriminalization of a violation in this area is that "'any act or practice in the nature of rental, lease, or lending' may be too ambiguous for criminal liability to be imposed."[8/] Given the unique nature of the

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6 Record Rental Amendment of 1984, Public Law 98-450, 98 Stat. 1727 (Oct. 4, 1984).

7 17 U.S.C. §109.

8 H. Rep. 98-987, 98th Cong., 2d Sess. at 5 (1984).

relief from criminal liability, Congress may wish to reexamine this provision at a later time as experience develops. It will have an opportunity to do so because Section 4(c) of the legislation contains a "sunset" provision to become effective "five years after the date of the enactment of this Act."

International Considerations

Our copyright laws and our criminal laws may not reach beyond our borders, but our concern with diligent prosecution of pirates here transcends our national boundaries.

Piracy is a worldwide problem, and it powerfully affects our national interest. Last year this Subcommittee received from the Copyright Office a comprehensive report on piracy throughout the world, with recommendations about ways to curb it,[9/] and another report of the economic significance of U.S. copyright industries in employment, revenues, and balance of payments.[10/] This year the President's Commission on Industrial Competitiveness declared:

> Today, the need to protect intellectual property is greater than ever. A wave of commercial counterfeiting, copyright and design infringement, technology pirating, and other erosions of intellectual property rights is seriously weakening America's comparative advantage in innovation. A recent study by the International Trade Commission estimates that American business loses almost $8 billion and 131,000 jobs

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9 To Secure Intellectual Property In World Commerce, published in Oversight On International Copyright, Hearing before the Subcommittee on Patents, Copyrights and Trademarks of the Committee on the Judiciary, U.S. Senate, 98th Cong., 2d Sess. September 25, 1984, Serial No. J-98-142.

10 Report of the United States Copyright Office to the Subcommittee on Patents, Copyrights and Trademarks, Committee on the Judiciary, United States Senate, on the Size of the Copyright Industries In the United States, December, 1984.

> annually though [sic] counterfeiting alone. [Citing to U.S. International Trade Commission, "The Effects of Foreign Product Counterfeiting on U.S. Industry," ITC Pub. No. 1479, 1984.] In the arena of international trade, we must create safeguards against the misappropriation of intellectual property for commercial purposes, especially by the newly industrializing countries.11/

Congress has recently passed legislation to restrain some piracy abroad of U.S. copyrighted works,[12/] and the Government has interceded with foreign governments to encourage adequate and effective protection of intellectual property.[13/]

Clearly the interest of the United States, the world's largest copyright producing and exporting country, lies in supporting not only adequate, but excellent standards of protection for copyrighted works throughout the world. Abroad and at home, the United States must seek to foster strong copyright laws adapted to rapidly changing technologies, and capable of efficient enforcement. To this end, we should make not only our own copyright laws, but also our enforcement of them, a model for other nations to follow.

For these reasons, the Government should place copyright high on its agenda of criminal law enforcement; and I hope that the Congress will provide the resources to do so.

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11 Global Competition, The New Reality, Report of The President's Commission on Industrial Competitiveness, Vol. 1, pp. 21-2, January, 1985.

12 Caribbean Basin Economic recovery Act, Public Law 98-67, 97 Stat. 369 (Aug. 5, 1983); The Trade and Tariff Act of 1984, Public Law 98-573, 98 Stat. 2948 (Oct. 30, 1984).

13 See report cited at footnote 9, supra, at p. 90. See also "U.S. government tries again to fix copyright problem with Canada," Broadcasting, April 1, 1985, p. 76.

Senator MATHIAS. Well, the committee will accept your invitation.

Mr. LADD. I might say that I know the private sector has intervened several times within the last several months urging the Library of Congress to remove the freeze on this project.

Senator MATHIAS. It would be an extremely important case. The Chinese, with their enormous population of over 1 billion people who are determined to improve their condition in life, are working very hard on their economy. Historically they have placed great emphasis on intellectual pursuits. Inevitably they will be pace setters in their part of the world, if not in the whole world, in questions of this sort.

Mr. LADD. Perhaps I should make explicit this point. In my opinion, the fact that such good relations have been developed between the Copyright Office and the copyright planning officials in China is of enormous importance, and I think that it is important to proceed with these plans and not to disappoint their expectations.

The second thing is that it is discernible that the Chinese, after a very deliberate pace of preparation for their new law, which sometimes disappointed expectations in the United States, that that activity has now picked up considerably in pace, and I think we should in our own interest help the Chinese move forward to the adoption of their new law and administrative infrastructure as early as possible.

It is clear that the copyright officials in China do have a special confidence in the copyright officials in the United States.

Senator MATHIAS. Perhaps we should remember Napoleon's injunction, let China sleep because when she awakes she will make the world tremble. She may be waking up in the field of copyright, and so if we do not want to tremble, we had better cooperate.

Let me just ask you a couple of questions in light of your experience.

I am told that this very morning just across the street the Supreme Court is deliberating over the issue of whether record piracy cases can be prosecuted under the National Stolen Property Act, which has higher penalties than the 1982 piracy amendments provide. If the Court affirms the *Dowling* case, which would authorize the use of the National Stolen Property Act as a copyright enforcement tool, then are we caught with some kind of ambiguity in the scale of penalties? Should there be some harmonizing of penalties?

Mr. LADD. I am not familiar enough with that litigation to express an opinion on it, but I see the point that you are making, that with disparity in the penalties under the two acts——

Senator MATHIAS. If the Court says the National Stolen Property Act applies and you suddenly have a whole other scale of penalties, which are substantially higher, I am just wondering, in light of your experience, if you could speculate on what kind of problems that might present?

Mr. LADD. Mr. Chairman, I do not think that necessarily there would be any problem, and I say that for this reason. If the penalties are higher under the National Stolen Property Act than they were under the Copyright Act and the relevant sections of title 18, the fact is that the penalties now in the Copyright Act, even

though lower, I think are adequate to do the job to deter commercial piracy at which those sections were directed.

So it is really a matter of enforcement. I think these hearings have already served a valuable purpose because let us assume the hearings did not cause any change in the Department of Justice. At least what their policy is is a lot clearer.

Senator MATHIAS. We are told that the hearings had no effect.

Mr. LADD. I accept it.

Senator MATHIAS. I accept it.

Mr. LADD. All I am saying is it is now clear what their policy is, and I think it is one which is important.

Senator MATHIAS. You think the employment of the National Stolen Property Act might have been merely an inspiration of some aggressive bright young assistant U.S. attorney?

Mr. LADD. Then more power to him.

Senator MATHIAS. And not any deficiency in the 1982 amendments?

In your statement you note that the 1984 record rental amendments exclude the possibility of criminal liability for unauthorized record rental. That makes it one of the few copyright violations that cannot be the subject of a criminal prosecution.

Is there, in fact, a valid distinction between record rental and other copyright infringements?

Mr. LADD. Not that I see, at least not in theory. I do not criticize the act on that basis. I simply observe that it was a deliberate choice not to impose criminal penalties for the violation of the new right created by the modification of the law. All I am saying is that since that section is sunsetted by its terms, there would be an opportunity to review that legislation and, at that time, to review also whether or not the extension of the criminal remedies for violations of this section would not be appropriate on the basis of the experience in 5 years.

Senator MATHIAS. We thank you very much for being with us this morning, and we appreciate the benefits of your experience and we are glad to see you again.

Mr. LADD. Thank you, Mr. Chairman.

Senator MATHIAS. The final witness today is also a former Register. We are happy to welcome back to the committee one for whose expertise and experience we have great appreciation, Ms. Barbara Ringer.

I understand you have no prepared statement.

STATEMENT OF BARBARA RINGER, FORMER REGISTER OF COPYRIGHTS, WASHINGTON, DC

Ms. RINGER. That is correct, Mr. Chairman. Thank you.

I do appreciate the honor of being invited to testify today. And if I might take up your offer, I should like to provide you with a written statement later after I have had an opportunity to make my remarks this morning.

Senator MATHIAS. Yes; your written statement, if it is supplied within 3 weeks, will be made a part of the record.

[The following statement was subsequently received for the record:]

PREPARED STATEMENT OF BARBARA RINGER
FORMER REGISTER OF COPYRIGHTS

In January of this year the U.S. Supreme Court handed down its decision in Mills Music, Inc. v. Snyder, 105 S. Ct. 638, a case involving the so-called "derivative works exception" to the termination provisions of section 304 of the Copyright Act. The court ruled that, even after termination of its contract with an author, a publisher can continue to share royalties from the distribution of sound recordings made by others.

I believe that this decision runs counter to Congressional intent and is seriously prejudicial to the legitimate rights of authors and their heirs. My hope is that Congress can be convinced to reexamine this important problem and ultimately to redress the imbalance created by the Mills decision.

The Background of the Decision

The Mills case arose under section 304 of the 1976 Copyright Act, dealing with the duration of subsisting copyrights already in existence when the new law took effect. Section 304 extended the total duration of subsisting copyrights from 56 to 75 years; it also gave authors (or certain of their heirs) the right to terminate any of the author's grants of rights and to reclaim full copyright ownership during the 19-year extension of the term.

However, this right of termination was made subject to an exception:

> A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant. 17 U.S.C. § 304(c)(6)(A).

The work involved in the Mills case was the 1923 song "Who's Sorry Now?". In 1940 the author, Ted Snyder, assigned his rights under the

copyright to the music publisher Mills Music, Inc., in exchange for a commitment to pay royalties, including half of all net royalties received by the publisher from its licenses with record companies. The publisher in turn licensed various record companies to make sound recordings and to manufacture and distribute phonograph records of the song.

The sound recordings made under these licenses are "derivative works" which are owned and exploited by the various record companies licensed by the publisher. The publisher's role here is essentially that of a middleman, since it has nothing to do with the making of the derivative work or with the manufacture and distribution of the records reproduced from it. The publisher was entitled to collect record royalties which, under its agreement with the author, it was obliged to divide equally with the author or his successors. This fifty-fifty split of record royalties between author and publisher was standard in songwriter contracts of the time.

The Effect of the 1976 Statute

Under the new law, which came into effect on January 1, 1978, copyrights already in their second term were automatically extended by 19 years; the 1923 copyright in "Who's Sorry Now?" is thus scheduled to expire at the end of 1998. Taking advantage of the termination provisions of section 304, Ted Snyder's statutory heirs at the proper time filed the necessary notices of termination of his grant to Mills Music.

What were the legal effects of this act of termination? There seems to be general agreement as to the following conclusions:

First, the publisher ceases to be the copyright owner and the persons filing the termination (in this case the author's heirs) become the owners of the copyright.

Second, the record companies can continue to manufacture and distribute records and tapes reproduced from sound recordings already made under their licenses with the publisher. A sound recording is a "derivative work" and, under the "derivative works exception,"

the record companies clearly have the privilege of continuing to utilize their recordings.

Third, the record companies must continue to pay the same amount of royalties provided for in their licenses. They must pay these amounts to someone, but to whom? This was the question in the Mills case.

The Decision in Mills v. Snyder

The issue facing the Supreme Court in the Mills case was whether the publisher, who had nothing to do with the derivative work other than collecting royalties from it, was still entitled to its share of the royalties, or whether the termination of its grant means that all royalties should go to the author or his heirs.

I believe that Congress meant the author to have the full benefit of the copyright in this situation. In a five-four decision, the Supreme Court decided otherwise, holding that under the derivative works exception the publisher may continue to share the royalties generated by utilization of derivative works by other licensees, even after the author or his heirshave recaptured the copyright. There was a strong dissent for the minority written by Justice White with which I agree.

The decision in Mills Music, Inc. v. Snyder settled questions of statutory construction and is now the law of the land. While I disagree with the majority's interpretation of the wording of the statute, it would be pointless for me to sift over the complex technical arguments on which the decision turned. Technicalities aside, however, I believe that the result reached in the Mills case is not what Congress intended, and that it represents a windfall for publishers at the expense of authors and their families.

Under this decision, authors and their heirs will be deprived of benefits that Congress meant them to have. If, as I believe, the decision runs counter to the legislative intent, then Congress should reexamine the question. And if, after this reexamination, it becomes clear that there is a wrong needing to be righted, then Congress should consider revising the law.

The Scope and Importance of the Decision

As obscure and esoteric as this question may appear, it is of immense importance to much of the copyright community. It involves a great deal of money, and its impact goes far beyond the facts in the Mills case. There are four points to be made here:

First: The decision applies not only to music and sound recordings but also to every conceivable type of copyrightable work and to every conceivable type of derivative work that can be made from a copyrighted work.

Second: In the Mills case the author's grant to the publisher provided for him to receive 50 percent of the record royalties, and his heirs will, under the decision, continue to receive this share. But, especially in fields other then music, the author's grant to the publisher or middleman-entrepreneur may not provide for any author's share of royalties from licensing particular kinds of derivative works. If the publisher or entrepreneur can continue to receive 100 percent of the royalties, the termination of the author's grant becomes a hollow mockery.

Third: The Mills case dealt with section 304 and the 19-year extension of subsisting renewal copyrights. But the 1976 Act contained a parallel and potentially far more important provision in section 203. Under that section, authors and their heirs may terminate grants made after January 1, 1978 at the end of a prescribed period of years, but subject to the same "derivative works exception" as that construed in the Mills decision. Thus, unless the Supreme Court's ruling is changed by Congress, its impact will continue into the indefinite future.

Fourth: Most important of all, the issue in the Mills case raises the fundamental question of whom Congress is seeking to benefit by means of the termination provisions in both sections 304 and 203. Does it really mean to benefit the holders of old contracts that go back for generations, or does it want to give real, rather than illusory, benefits to authors and their heirs?

The Question of Legislative History

Both the majority and minority opinions in the Mills case dwelt at length on the legislative history of the statutory provisions, a subject on which I have some personal knowledge. It is no secret that I was the author of the provision in question, in the sense that it was my pen that drafted the language. The content of the termination provisions had been hammered out following lengthy debates and discussions, although the compromises had been reached and the issues effectively settled before Congress took up the question of general revision of the copyright law in f ormal hearings. The Copyright Office was the initial drafter of the entire revision bill, including the termination provisions, and it is important to recognize thatthe Copyright Office, as part of the Library of Congress, is an arm of Congress in the legislative branch. Moreover, counsel from the committees charged with copyright responsibilities in both Houses played an active and continuing role in the whole process that led to the development and drafting of the revision bill.

Legislative Intent: The Relation Between Longer Copyright Terms and Termination of Grants

It is important to recognize that the right of termination given by Congress to authors and their heirs in the 1976 Act was not attached to anything already in existence. In the case of section 304, the termination applied only to the 19-year extension of subsisting renewal copyrights--an entirely new term of copyright carved out of what would otherwis e have been the public domain. In the case of section 203, the termination applied only to contracts written after the new law came into effecg, and that new law provided for a radically different and much longer term of protection.

In both cases Congress was granting a new right, and I believe it is fair to say that Congress would have been extremely reluctant to do this unless it had been assured that individual authors would at least have the opportunity of enjoying the benefits of these new rights. If the author's old and, in many cases, unfair contracts were to be pre-

served without any provision for termination, I do not think Congress would have extended the length of the copyright term.

Furthermore, the copyright clause of the Constitution empowers Congress to secure to authors the exclusive right in their writings. Bearing in mind that Congress was creating entirely new rights with these longer terms, I believe there is a genuine question as to whether the new rights could be granted to entities other than authors, which for many older copyrights would have been the case.

The basic purpose of the termination was to make sure that authors or their heirs had the opportunity to renegotiate their old contracts, rather than merely letting the contracts run on through the longer copyright term. In a great many cases, I believe that the Supreme Court decision will effectively defeat this purpose.

Legislative Intent: The Means Congress Chose to Protect the Investments of Publishers and Other Intermediate Entrepreneurs

As already noted, in the 1976 Act Congress enacted two different types of terminations: (1) the section 304 termination of grants covering the 19-year extension of subsisting renewal copyrights; and (2) the section 203 termination of grants made after the effective date of the new law. While the two are closely related, they differ in certain important respects.

In cases involving the first type of termination, the publisher or other grantee had received everything it ever had any right to expect. There could be no question of allowing the grantee more time to recover its investment, since it had already had 56 years in which to do so, and had never expected anything more. The added 19-year term was a new right and Congress intended it to go to the author or the author's heirs.

With respect to the second type of termination--that is, terminations made under section 203 of grants executed after January 1, 1978--the thinking was somewhat different. Congress had decided to phase out the old renewal provision, which included the possibility of reversion to the author or the author's heirs after 28 years. The renewal provision was far from satisfactory in practice, but in some cases it did

allow authors or their heirs to recapture their copyri ghts. In abandoning renewals and creating a much longer copyright term (the life of the author plus 50 years, or even longer in some cases), Congress had to face this question: should an unremunerative or unfair contract made by the author at the beginning of a copyright be allowed to run on for upwards of 100 years without the author and his family having any further opportunity to benefit from it?

There were extremely long and difficult negotiations over this question, and they eventually produced a compromise agreement consisting of two main principles:

(1) Authors and theirfamilies should have the opportunity to terminate grants made after the new law comes into effect, but only at the end of a stated period of years.

(2) Starting when the grant is made, that period of years should be long enough to allow the entrepreneur to recover what could reasonably be expected as a return on its investment, but not so long as to constitute a windfall at the expense of the author. After more extended discussions a compromise was reached, and the period was set at 35 years, with some variations.It was in this way that the interests of the entrepreneurial copyright owner--the first grantee--were taken into account: by according it a substantial period of time in which to realize its investment.

Legislative Intent: The Question of Derivative Works

With respect to terminations under both section 304 and section 203, it was agreed after much discussion that the right of termination should be absolute and inalienable. Authors and their heirs could no longer sign away their reversionary expectancy, as they had been regularly induced to do under the renewal section of the 1909 Act. But another question had also been lurking behind the old renewal provision: when a derivative work has been created and exploited during the first 28-year term under license from the copyright owner, what happens when the renewal copyright in the pre-existing work reverts to someone else?

The typical case, which also caused the most concern, involved

a motion picture derived from a copyrighted novel or play: if the author of the underlying work recaptured the renewal copyright, did this mean that the motion picture had to be taken out of distribution unless a new license were obtained? In some cases, of course, the derivative work is a more important or valuable property than the pre-existing work.

It was finally agreed that, infairness to the owner of the derivative work, and to avoid depriving the public of access to derivative works in this situation, a "derivative works exception" should be written into both sections 304 and 203. The purpose of the exception was to keep the derivative work in circulation and not to deprive the owner of the derivative work of the use of its own property. The sole beneficiary of the exception was intended to be ghe owner of the derivative work who wanted to continue utilizing it.

In the context of the Mills case, let us assume that Ted Snyder, instead of granting rights to Mills Music, directly licensed the record companies to make and distribute recordings. Under the exception, the record companies would have the statutorily-sanctioned privilege of continuing to exploit the sound recordings already made before termination, provided the prescribed license fees continued to be paid to the author. The difference in the actual Mills case was that the record companies had taken licenses, not from the author, but from the author's grantee. Should this mean, as the Supreme Court held, that the terminated grant stays in effect as far as royalties from licenses given by the author's grantee are concerned, and that the author is thus deprived of the full share of royalties?

In my opinion, the intention of Congress was that termination should mean termination. In the Mills case situation the publisher had alrady received everything Congress ever intended to give it. The intended beneficiary of the exception was not the entrepreneur who had originally licensed the work, but the owner of the derivative work who was utilizing it. The middleman is not the owner of the derivative work and is not utilizing anything. I believe that the Supreme Court decision seriously undercuts what Congress intended and deprives authors of benefits that are rightfully theirs.

Ms. RINGER. Thank you very much.

I should like to talk about a subject that has not been brought up at all today, the question of the effect on copyright owners and authors of the Supreme Court decision in the *Mills* case—*Mills Music, Inc.* v. *Snyder*—somewhat poignantly known as the "Who's Sorry Now" case.

To give you a little bit of background on this rather complex matter, the 1976 act extended the duration of copyrights and gave authors the right to terminate any grants of rights and to reclaim ownership of all rights under the extended terms of copyright, but subject to an exception. If you will bear with me, I will try to use the exact statutory language in describing this exception.

If a "derivative work" has been "prepared under authority of the grant"—if the author has made a grant and a derivative work has been made under that authority—it "may continue to be utilized under the terms of the grant after its termination." "[C]ontinue to be utilized" was the phrase used.

Senator MATHIAS. That is a case in which the calf would not go with the cow?

Ms. RINGER. That is exactly correct.

The copyright involved in the *Mills* case was an old copyright, dating from 1923. In 1940, the author granted the copyright to a music publisher and the publisher—in effect acting as a middleman in this case—in turn licensed various record companies to make derivative works—that is, phonograph records. The situation in this case would apply to any kind of derivative work—motion pictures, plays made from novels, and so forth—so the impact of this decision is fairly broad.

The publisher does not make the derivative work in this situation. It is acting as a middleman, and it does not have anything to do with the distribution or utilization of the derivative work. But the publisher gets royalties which, depending upon the terms of its contract with the author, it may or may not not share with the author. In this case, at least as far as the decision shows, the author got 50 percent. The author got 50 percent and the music publisher got 50 percent, which was a standard division of record royalties at the time.

So that was the situation going into the 1976 law. Under the new law, copyrights already in existence and renewed were extended by 19 years, so this 1923 copyright in "Who's Sorry Now" would not run out until the end of this century, 1998 or 1999 or something like that. The author or his heirs were obviously not satisfied with his 1940 deal and terminated the grant. They went through the routine that was laid out in the statute to do that.

Everybody seems to agree that what the author did by filing the termination means that now the author is the owner of that copyright. (It was actually the author's heirs in the *Mills* case, but I am oversimplifying because it gets pretty complicated.) I think both the minority and majority opinions in the case also agree that the record company can go on distributing the records. That is clearly within the exception. A sound recording is a derivative work, and the record company has the privilege of distributing the records.

There is some question under the various opinions in the *Mills* case, but I think you can also assume that the record company

cannot do this free. That would make a mockery of the provision. The record company has to pay something to somebody. Under the statute they have to meet the terms of the agreement, which I interpret as meaning that the amount of money that has to be paid under the various recording agreements has to be paid to someone. But to whom? That is the crucial question.

Is the publisher, the middleman, who did not have anything to do with the derivative work other than collecting royalties from it, still entitled to a share of the royalties, or does the termination of its grant mean that all the royalties should go to the author?

I believe that Congress meant the author to have the full benefit of the copyright in this situation. In a 5-to-4 decision, the Supreme Court decided otherwise. There was strong dissent by Justice White, with which I agree. I will not go into the nuts and bolts of this decision. It was a very complex statutory construction decision. I think you have to say, and I have to emphasize, that this is now the law of the land. Whether I think it is right or wrong is irrelevant as far as the courts are concerned. The case is decided and there is no point in my rehashing the legal arguments.

Senator MATHIAS. This is the place to do it, though.

Ms. RINGER. What I mean is that I am not going to reargue the statutory construction questions in the case. What I am going to do is to say why I think it was not the intention of Congress to have the result that the Supreme Court came out with, and I will tell you why. If that is rearguing the case, I guess I am rearguing the case.

Justice Stevens in his majority opinion called this a puzzle, and it is a bit of a puzzle. It was a difficult case and it was a hard case, and I think it made bad law.

Senator MATHIAS. I am turning out the red light because this is exactly the question I was going to ask you so you are on your question time now.

Ms. RINGER. Please ask any questions you want. Do not hesitate to interrupt

I believe that, under this decision, authors and their heirs will be deprived of benefits that Congress meant them to have. And if I am right—if the decision did run counter to what Congress intended—then Congress should reexamine the question. Congress is where the action is now, if there is anything to be done about it; if Congress believes, after this reexamination, that there is a wrong here that should be righted, I think it should consider revising the law.

This is technical and somewhat escteric and arcane, to use someone's phrase earlier today. But it is a very important question. It involves a great deal of money. The impact goes far beyond the fact situation in the *Mills* case, because it applies to all types of works, not just music, and because it applies not only to the extension of the old copyrights but also to every termination of any grants made since 1978. More important than anything, there is a philosophical question here of whom Congress want to benefit. Do they want to benefit the holders of old contracts that go back to the twenties or the forties, or do they want to benefit authors and their heirs?

I think I should say a word about the legislative history. There is an awful lot in the Mills opinions about it, both the majority and

the minority. I do not think it is any secret that I was the author of this provision. It was my pen that wrote it, although there was a vast amount of input from hither and yon. For this reason I don't think it is altogether presumptuous of me to talk about legislative intention, despite the fact this issue was really settled by the time the Congress took up the question of general revision of the copyright law in formal hearings.

There was an enormous amount of debate and discussion on this subject of the right of termination, and I should say two things about it. First of all, the Copyright Office was the drafter of this provision, and the Copyright Office is an arm of Congress. I am a former Register of Copyrights, which is an office in the legislative branch.

Senator MATHIAS. We need an amanuensis.

Ms. RINGER. Furthermore—what is the plural of amanuensis?

Senator MATHIAS. Amanuenses.

Ms Ringer. Thank you. Furthermore, we had amanuenses in the form of counsel from your committee and from your counterpart in the House who were part of this whole process, so it was not as if this came out of the blue. There was a long period of development, and I think I can speak as to what the legislative intention was. The legislative intention no longer matters in the case of *Mills* v. *Snyder*, but I think it is relevant to what Congress will do from here on out.

I have three points I want to make, but if at any time you want me to stop, I will.

Senator MATHIAS. Let us just reflect for a second on the point you just made.

The intent of Congress was to benefit the author. But what about the sanctity of contracts?

Ms. RINGER. The whole purpose behind this termination provision was to grapple with the tension between the sanctity of contract and the desire to protect the author, and this is one of the points I want to make.

Senator MATHIAS. You keep anticipating my questions.

Ms. RINGER. First of all, what Congress was dealing with here was not existing rights. These were extensions of the terms of copyrights. Congress was doing something pretty radical here. These were the most important things in the whole revision: The extension of the term of the subsisting copyrights and the lengthening of the term for copyrights that were yet to come into being—post-1977 copyrights, in other words. They were granting a new right, and I believe it is fair to say that Congress would have been reluctant to do this—or maybe would not have done it at all—unless it was assured that authors would have a crack at these extended rights. If the new law was just going to preserve the status quo and allow the existing contracts to go on, I do not think that Congress would have extended the term, and I am not sure the Copyright Office would have wanted them to.

Senator MATHIAS. That would have been a form of unjust enrichment.

Ms. RINGER. In a way. A great many old copyrights were involved. Furthermore, the Constitution speaks of "securing to *authors* the exclusive right in their writings." I think the question

has legitimately been raised as to whether or not Congress can simply with a stroke of the pen grant copyrights to people other than authors, which for many of these older copyrights would have been the case.

The basic purpose of the termination was to make sure that authors or their heirs had first crack at renegotiating their old contracts rather than just letting the contracts run on through the longer copyright term. And I believe that the Supreme Court decision effectively defeats this purpose in a lot of cases.

My second point comes closer to answering your question. Congress in the 1976 act enacted two different types of terminations. This gets complicated, but bear with me.

The first type is the kind that covers the extra 19 years that was added to old subsisting copyrights. The second was a termination covering grants made after the new law came into effect. While the two are closely related, they are in different sections of the law and they are different in some respects. I think that this is one of the problems with the Supreme Court's majority opinion—that they did not properly recognize the background of all of this.

With respect to the first kind of termination—that is, the extra 19 years added onto the end of the original 56-year term—the grantee (the publisher or whoever) had received everything that it ever had any right to expect. The grantee was expecting 56 years; it got 56 years. Congress was creating a new right. It was a new grant, and I believe that it was pretty solidly felt that the beneficiaries of the added terms should be the individual authors or their heirs. In the case of the added 19 years I think the constitutional question was very real.

Now with respect to future grants—grants made after 1978—the thinking was a little different. For the future Congress was phasing out the old renewal provision. That provision included a reversion to the author and the author's heirs. The old reversion did not work very well, but in some cases the authors or the authors' heirs did get their copyrights back. For the future, Congress was doing away with renewals and providing a much longer term, upward of 100 years in some cases. So it considered whether or not a contract made at the beginning of the copyright between a publisher, let us say, an author who did not know what his work was worth, should be allowed to run on for 100 years with the author having no further opportunity to benefit from it.

So the problem that was facing the Copyright Office first, and then via the Copyright Office the problem that faced Congress was whether or not to provide a termination after a period of years—to give the author an opportunity to say, "No, this contract is not to my benefit; I want another one," or "I want to reclaim my copyright—the birthright that I sold for a mess of pottage." That happens, believe me.

Once it was decided that there should be a termination provision. The big effort was to determine how long was long enough. How long would be long enough to allow a publisher to get the benefit of his investment and take everything he could get out of it that could be reasonably expected, but would be not too long to constitute a windfall at the expense of the author. We started out in the Copyright Office with 20 years, saying the author could reclaim

after 20 years and, of course, there was a lot of protests from the publishers, and eventually we came out with something like 35 years, with some variations. After long negotiations the termination period was nearly doubled.

What I am saying here is that the interests of the entrepreneurial copyright owner, the first grantee, were taken into account in this situation. That is how they were taken into account—by substantially extending this period of time. They agreed to this. This was, I think, their main concern, that this term be long enough for them to get their investment back.

In both cases it was agreed to, after much discussion, that the termination was an inalienable, absolute right. Authors could not sign it away as they had been doing under the old renewal right. You could not even make an agreement to make a will, that type of thing.

Senator MATHIAS. You could not deprive your heirs of it?

Ms. RINGER. That is right. You could not deprive yourself of it either, if you happened to be still living when the period for termination arrives—think of Eubie Blake. If you live long enough you do have the opportunity to reclaim your own copyrights.

This was the thinking behind these provisions, sections 203 and 304. But it turned out that merely providing for termination was not enough, because of the problem of derivative works. Let us say that, unlike the *Mills* case, the author deals directly with the record company and gives the record company the right to make records. Or—and this was the big issue at the time—let us say that the author deals directly with the motion picture company, and the motion picture company makes a big production based on the author's work.

There was very serious concern that if this basic philosophy was adopted without some kind of exception, the owner of the derivative work would be deprived of the right to exploit its own work. And, of course, there were some famous cases where this problem actually arose under the old renewal provision. I believe the problem came up with respect to "Gone With The Wind," and you may have wondered why the Marx Brothers' "Animal Crackers" was not on the tube for many years.

In some cases, the motion picture is a more important property in certain senses than the work on which it was based.

It was felt unfair, and I think that the authors came to this view as well, not to allow the owner of the copyright in the derivative work the untrammeled privilege to utilize it. The derivative work owner could not make new derivative works or use the preexisting work any other way, but it was given the privilege to continue licensing it for exhibition, let us say. With one wrinkle, this is the situation that arose in the *Mills* case with respect to sound recordings.

You had an author who had granted rights. You had a record company who had made records, and under the exception that I mentioned at the outset, there is no question that the record company can continue—as a privilege, not as an owner, but as a statutorily sanctioned privilege—to continue to exploit the works.

There was also a question of public policy. Obviously, the public wants access to these works. If you prevent them and if you tie it

up from being used at all because of claims in underlying works, as apparently happened for a time in the case of "Animal Crackers," for example, you may not be serving the public interest.

So the exception was written, giving the owner of the derivative work the right to utilize it after the termination under the terms spelled out in the terminated grant. This meant, in cases where you did not have this intervening entrepreneur, that the record company, for example, would have to go on paying the royalties, and they would be going 100 percent to the author. Where the record company had taken its license, not from the author, but from the author's grantee, the exception in my opinion was not intended to deprive the author of his or her full share of the royalties.

It is a technical and difficult question, but it is a very important one. In my opinion, the intention of Congress was that termination means termination. And if the entrepreneur's rights were only contractual—if it did not create and own the derivative work in question—then Congress intended that the entrepreneur's rights would be terminated, assuming that the author went through all the statutory requirements for termination.

Senator MATHIAS. It was not a relationship in the first degree?

Ms. RINGER. That is right.

Senator MATHIAS. It went to the second degree or beyond, and you would say it was terminated.

Ms. RINGER. I am saying it would be the same. It is immaterial whether the derivative work was licensed by the author or by a middleman. I think the author gets it back in either case. It shouldn't matter whether there is an intervening agreement as there was in the *Mills* case, but that was, of course, the difference that the decision turned on.

The middleman/entrepreneur had already received everything that Congress intended to give it; all the benefits that were there it had already received. The intended beneficiary of the exception was not the entrepreneur who was doing the contracting, but the owner of the derivative work who was utilizing it. If it would serve my purpose I could go into a construction of the statutory language to try to show why I think this is what the language says, but it is pointless now. The case has been decided at the highest judicial level and now it is up to Congress to see what it can do.

The middleman is not the owner of the derivative work and it is not utilizing anything. I do believe that the Supreme Court decision seriously undercuts what Congress intended and deprives authors of benefits that are rightfully theirs.

Thank you, Mr. Chairman, and I would be more than happy to put this in writing if you would like.

Senator MATHIAS. If you would put it in writing, I think it would be helpful as you have obviously raised an interesting issue and one that will require a little reflection. I think if we have your written statement, it will encourage that reflection not only on my own part but on that of other members of the committee.

Of course, it refreshes my recollection of that 1976 debate to hear you raise some of these points again. That was an interesting and, I think, generally useful episode in Senate history.

Ms. RINGER. It was certainly a pivotal episode in my life.

Senator MATHIAS. I think it was an important debate, more so than many that we conduct around here.

Ms. RINGER. I am very glad to hear you say so.

Senator MATHIAS. It had more lasting impact, I think, than a great many of the things that we have here.

Let me just ask you one other question.

Whenever there is an uncertainty of the kind you described, the *Mills* case, what is the impact on enforcement? What has been your observation? If people see a lawsuit looming ahead, do they tend to assert their rights or do they just back away?

Ms. RINGER. Well, of course, this was between people that were all on the copyright owner's side of the ledger, and it was a hassle over who gets the money, which is basically the question. No question of enforcement as against a malfeasor was involved.

Senator MATHIAS. So in the old statement, when someone says it is not the money, it is the principle of the thing, that means it is the money?

Ms. RINGER. It is the money in this case, although that is what the copyright law is often about when you get right down to it. Certainly the termination provisions were.

But if I may, I should like to give a broader answer to your question because I think it is an important one.

Obviously, we are in a period of bounding technology, and the result of all this change in a strange but predictable process in which people who want to use a work without paying anybody ease their way into exploiting other peoples' works via the new technologies. They are cautious at first, and then gradually they get bolder and bolder. If their lawyers are not sure that their clients will lose in the courts, then they tell them, "Oh, go ahead." Eventually the users become convinced that they are absolutely right—that they have a God-given right to capitalize on someone else's work. And if the law is not clear—and, of course, that was the *Betamax* case—then once they become a major factor in society, they are likely to win because the consequences of holding against them seem kind of horrendous.

Senator MATHIAS. The public becomes involved and takes a position.

Ms. RINGER. Consumer groups arise, and so forth.

Senator MATHIAS. What about failing to provide criminal sanctions in a copyright law, for example, the record rental law?

Ms. RINGER. I regretted to see that because I do think the testimony you heard today bears out my own observation that the worse it sounds—the worst-case scenario you can make out as to what can happen to an infringer—the more likely you are to attract the law enforcement officials' interest and the more likely you are to get results and to deter infringement. And deterrence, of course, is the main object of all of this, not winning lawsuits or putting people in jail.

Senator MATHIAS. It is preventing the lawsuits?

Ms. RINGER. Yes, that is right.

Senator MATHIAS. By suggesting the horrible consequences.

Ms. RINGER. That is right. People do not infringe. They go to their lawyer and ask, "Can I do it?" And the lawyer, instead of

saying, "Yeah, maybe you can," says "No, you cannot," and that is the end of it.

Senator MATHIAS. Like a collection agency I once heard about that had a standard letter that said, if you do not remit in so many days, what we will do to you will amaze you. [Laughter.]

Ms. RINGER. I have heard of something like that in copyright cases.

Senator MATHIAS. It had a high deterrence—high level of success.

It is a great pleasure to have you here.

Ms. RINGER. Thank you.

Senator MATHIAS. You have given us a lot to think about.

As I announced at the outset, the record will be held open for 3 weeks for additional statements and for responding to questions that may be submitted in writing.

The committee will stand in recess, subject to the call of the Chair.

[Whereupon, at 11:45 a.m., the subcommittee adjourned, subject to the call of the Chair.]

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